164-706

TRANSCRIPT OF RECORD.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 615.

CAROLINE M. FORSYTH, APPELLANT,

vs.

THE CITY OF HAMMOND ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FILED OCTOBER 1, 1896.
RETURN FILED OCTOBER 28, 1896.

(16,394.)

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a *Transcript of Record.*

In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, A. D. 1894.

CAROLINE M. FORSYTH, Appellant,
vs.
THE CITY OF HAMMOND and WILLIAM KLEIHEGE, Treasurer of said City, Appellees. } No. 264.

Mr. Thomas J. Merrifield, Mr. W. H. H. Miller, Mr. John B. Elam, Mr. Ferdinand Winter, counsel for appellant; Mr. Peter Crumpacker, counsel for appellees.

Appeal from the circuit court of the United States for the district of Indiana.

Transcript of record filed Aug. 12, 1895.
Printed record filed Sep. 5, 1895.

OLIVER T. MORTON, *Clerk.*

b In the Circuit Court of the United States for the District of Indiana.

CAROLINE M. FORSYTH
vs.
CITY OF HAMMOND and WILLIAM KLEIHEGE, Treasurer of said City. } No. 9215. Chancery.

1 Pleas of the circuit court of the United States for the district of Indiana, begun and holden at the United States courthouse, in the city of Indianapolis, in said district, on the first Tuesday of May, in the year of our Lord one thousand eight hundred and ninety-five, before Honorable John H. Baker, judge of the district court of the United States for the district of Indiana and *ex officio* judge of said circuit court.

CAROLINE M. FORSYTH
vs.
CITY OF HAMMOND and WILLIAM KLEIHEGE, Treasurer of said City. } No. 9215. Chancery.

Be it remembered, that heretofore, to wit: at the November term of said court, on the 30th day of April, 1895, before Honorable John H. Baker, judge of said court, the following proceedings in the above-entitled cause were had, to wit:

Comes now the complainant by Miller, Winter & Elam, her solicitors, and files her bill of complaint herein in the words following, to wit:

Bill of Complaint.

To the judges of the circuit court of the United States for the district of Indiana:

Caroline M. Forsyth of the city of Chicago and a citizen of the State of Illinois, brings this her bill against The City of Hammond, and William Kleihege, the treasurer of the said city, both of whom are citizens of the State of Indiana.

And thereupon your oratrix complains and says: That she is the owner and seized in fee of the tracts and parcels of lands in the county of Lake and State of Indiana described as follows:

Lots 2 and 3 and part of lot 1 in section 1, township 37, range 10 west; lots 1, 2, 3 and 4 in section 12, same township and range; the N. ½ of lot 1 in section 13, same town. and range; lots 1 and 2 in section 7, same town., range 9; lots 3 and 4 in same section, town. and range; the W. ½ of the N. W. ¼, and the S. E. ¼ of the N. W. ¼ of sec. 7, town. 37, range 9; part of lot 1 in sec. 18, same town. and range; part of fractional N. W. ¼ S. of the P., Ft. W. & C. R'y in section 6, town. 37, range 9; W. ½ of the S. W. ¼ of the same section, town. and range, containing in all about 725 acres; that 2 by proceeding instituted at the June, 1893, session of the board of commissioners of Lake county, Indiana, and from thence carried by appeal to the Lake circuit court, and from thence transferred by change of venue to the Porter circuit court of Indiana, the said city of Hammond pretended to annex and now claims to have annexed said lands of your oratrix, together with a large body of other lands, to the territory of the said city, and the said city now claims and pretends to exercise jurisdiction over the same and to have the right to assess said lands and the personal property thereon for taxation, and to levy and collect taxes on the same, as well to aid in the payment of the past and present indebtedness of the said city as to carry on the future government thereof; that the said city, in pursuance and assertion of the said claim, has by its officials levied taxes for the year 1894 against the said lands and personal property thereon of your oratrix to the amount of $3,500, and that the said William Kleihege, who is the treasurer of the said city, is in his official capacity proceeding and threatening to collect the same by the sale of the said lands, as well as by levy, distress and sale of the personal property of your oratrix, and will proceed so to collect the same unless restrained therefrom by order of the court.

That the whole of the said land of your oratrix is used solely by your oratrix for pasturage, and hay and other agricultural purposes; that the rental value of the said land does not exceed $100 per acre; that no part of said land has ever been mapped off or platted with a view to sale as such, nor does oratrix contemplate doing so; that on all said lands of your oratrix there are but twenty-one dwelling-houses, ten of them being in a row together, and near to—about one-fourth of a mile—the town of Whitney, in said county of Lake, containing 2,500 to 3,000 inhabitants, a town

of rapid growth and great business activity and prosperity, and that tenants of said ten houses do business and work and labor in said town, and the rest of said houses on said land are in clusters of two and three, which clusters are widely apart; that the houses on said land are four and one-half miles distant from any police station, fire-engine house or gas lamp of the city of Hammond, so that, in the nature of things, she cannot receive any service, advantage, or benefit whatever from the municipal government of the said city. That said lands were valued for taxation by said city at the rate of $250 to $500 per acre, and that said taxes amount to about $5 per acre; that said valuation is enormously in excess of the real value of the said lands, and that said taxes are exorbitant, oppressive and extortionate.

3 Your oratrix further says that at the same time said attempted annexation proceedings were instituted the said city of Hammond contained and still contains not more than 6,000 or 7,000 inhabitants, and that it had territory about three miles long, north and south, and about two miles wide east and west, extending on the west to the State line. The most populous portion of the city was and is on the extreme western line, or on the boundary line of the State of Indiana and the State of Illinois, beginning about one-fourth of the way from the northern boundary of the said city and extending thence to the southern boundary thereof. The northern frontier of the said territory consists of sections 24 and 19, or about two square miles of land, neither of which nor any part thereof has ever been laid off into lots or blocks, the one not having a single house or road upon it, and the other having but seven houses and one road at the time such proceedings for annexation *was* instituted, as aforesaid; that the part of Hammond laid off into lots is much larger than is now or likely to be required for city purposes for many years to come, and that its present boundaries contain nearly 4,000 acres, capable of conveniently containing and accommodating a population of almost a million of people; that the said city has a large bonded indebtedness, exceeding, as your oratrix is informed and believes, the sum of $100,000; that she has been unable to ascertain the exact amount of its floating indebtedness, but according to the best information she has been able to obtain such indebtedness is not less than $60,000, and that the total taxables of the said city proper amount in all to little more *more* than $4,000,000. That the territory attempted to be annexed consists of about five square miles lying directly north and extending all the way from the northern limits of the city of Hammond to the shore of Lake Michigan. Immediately on the north and overlapping somewhat the limits of the city are two lakes—Wolf lake and Lake George—shallow and having shores and margins of a marshy nature. Between these two lakes is a narrow neck of land, low and swampy, extending north and south, the narrowest point of said neck being about 450 feet wide at the northern limits of Hammond and widening to about 2,100 feet at the northern shore of Lake George, being in length about one mile. Along this neck or isthmus is the only direct route from the city of Hammond to the

Bill of Complaint.

To the judges of the circuit court of the United States for the district of Indiana:

Caroline M. Forsyth of the city of Chicago and a citizen of the State of Illinois, brings this her bill against The City of Hammond, and William Kleihege, the treasurer of the said city, both of whom are citizens of the State of Indiana.

And thereupon your oratrix complains and says: That she is the owner and seized in fee of the tracts and parcels of lands in the county of Lake and State of Indiana described as follows:

Lots 2 and 3 and part of lot 1 in section 1, township 37, range 10 west; lots 1, 2, 3 and 4 in section 12, same township and range; the N. ½ of lot 1 in section 13, same town. and range; lots 1 and 2 in section 7, same town., range 9; lots 3 and 4 in same section, town. and range; the W. ½ of the N. W. ¼, and the S. E. ¼ of the N. W. ¼ of sec. 7, town. 37, range 9; part of lot 1 in sec. 18, same town. and range; part of fractional N. W. ¼ S. of the P., Ft. W. & C. R'y in section 6, town. 37, range 9; W. ½ of the S. W. ¼ of the same section, town. and range, containing in all about 725 acres; that

2 by proceeding instituted at the June, 1893, session of the board of commissioners of Lake county, Indiana, and from thence carried by appeal to the Lake circuit court, and from thence transferred by change of venue to the Porter circuit court of Indiana, the said city of Hammond pretended to annex and now claims to have annexed said lands of your oratrix, together with a large body of other lands, to the territory of the said city, and the said city now claims and pretends to exercise jurisdiction over the same and to have the right to assess said lands and the personal property thereon for taxation, and to levy and collect taxes on the same, as well to aid in the payment of the past and present indebtedness of the said city as to carry on the future government thereof; that the said city, in pursuance and assertion of the said claim, has by its officials levied taxes for the year 1894 against the said lands and personal property thereon of your oratrix to the amount of $3,500, and that the said William Kleihege, who is the treasurer of the said city, is in his official capacity proceeding and threatening to collect the same by the sale of the said lands, as well as by levy, distress and sale of the personal property of your oratrix, and will proceed so to collect the same unless restrained therefrom by order of the court.

That the whole of the said land of your oratrix is used solely by your oratrix for pasturage, and hay and other agricultural purposes; that the rental value of the said land does not exceed $100 per acre; that no part of said land has ever been mapped off or platted with a view to sale as such, nor does oratrix contemplate doing so; that on all said lands of your oratrix there are but twenty-one dwelling-houses, ten of them being in a row together, and near to—about one-fourth of a mile—the town of Whitney, in said county of Lake, containing 2,500 to 3,000 inhabitants, a town

of rapid growth and great business activity and prosperity, and that tenants of said ten houses do business and work and labor in said town, and the rest of said houses on said land are in clusters of two and three, which clusters are widely apart; that the houses on said land are four and one-half miles distant from any police station, fire-engine house or gas lamp of the city of Hammond, so that, in the nature of things, she cannot receive any service, advantage, or benefit whatever from the municipal government of the said city. That said lands were valued for taxation by said city at the rate of $250 to $500 per acre, and that said taxes amount to about $5 per acre; that said valuation is enormously in excess of the real value of the said lands, and that said taxes are exorbitant, oppressive and extortionate.

3 Your oratrix further says that at the same time said attempted annexation proceedings were instituted the said city of Hammond contained and still contains not more than 6,000 or 7,000 inhabitants, and that it had territory about three miles long, north and south, and about two miles wide east and west, extending on the west to the State line. The most populous portion of the city was and is on the extreme western line, or on the boundary line of the State of Indiana and the State of Illinois, beginning about one-fourth of the way from the northern boundary of the said city and extending thence to the southern boundary thereof. The northern frontier of the said territory consists of sections 24 and 19, or about two square miles of land, neither of which nor any part thereof has ever been laid off into lots or blocks, the one not having a single house or road upon it, and the other having but seven houses and one road at the time such proceedings for annexation *was* instituted, as aforesaid; that the part of Hammond laid off into lots is much larger than is now or likely to be required for city purposes for many years to come, and that its present boundaries contain nearly 4,000 acres, capable of conveniently containing and accommodating a population of almost a million of people; that the said city has a large bonded indebtedness, exceeding, as your oratrix is informed and believes, the sum of $100,000; that she has been unable to ascertain the exact amount of its floating indebtedness, but according to the best information she has been able to obtain such indebtedness is not less than $60,000, and that the total taxables of the said city proper amount in all to little more *more* than $4,000,000. That the territory attempted to be annexed consists of about five square miles lying directly north and extending all the way from the northern limits of the city of Hammond to the shore of Lake Michigan. Immediately on the north and overlapping somewhat the limits of the city are two lakes—Wolf lake and Lake George—shallow and having shores and margins of a marshy nature. Between these two lakes is a narrow neck of land, low and swampy, extending north and south, the narrowest point of said neck being about 450 feet wide at the northern limits of Hammond and widening to about 2,100 feet at the northern shore of Lake George, being in length about one mile. Along this neck or isthmus is the only direct route from the city of Hammond to the

property of value sought to be annexed, the most populous and most valuable portion of which lies in the very northern part of the tract and near the trunk lines of the railroads that skirt the shore of Lake Michigan and near to the city of Chicago; the distance from
4 the business portion of the city of Hammond to this part of the territory is between four and five miles, and the only means of connection between the two is a low, bad and muddy road along and over said narrow isthmus or neck of land. That previous to said attempted annexation one Agnes Roberts had laid out into lots and mapped and platted about twenty acres in the northeast part of said territory and adjoining the said town of Whiting in said Lake county, solely with reference to said town, and without any reference whatever to said city of Hammond, lying between four and five miles away, and that before the said attempted annexation Edward Roby and Edward A. Shedd had laid off and platted two tracts of land, amounting in all to thirty-five acres, in the northwest part of the territory sought to be annexed, into lots, which they denominated Roby & Shedd's addition to Chicago in Indiana; and said lots were so platted with reference to South Chicago and the Roby race-track, and had no reference whatever to the city of Hammond, distant therefrom about five miles; that the whole of said territory sought to be annexed, except the parts platted as aforesaid, consists, in part, of said ridges and sloughs, all of which that is not vacant is used for pasturage and agricultural purposes solely; that the same is very sparsely and thinly settled, and that the dwelling-houses and buildings thereon, except a very small portion thereof in said northeast corner, are widely separated from one another; that the inhabitants thereof have no need whatever of municipal government, and from the nature of the situation, it is utterly impossible that they could derive any advantage or benefit whatever from being included within the corporate boundaries of the said city of Hammond, and burdened with heavy taxation thereby; that said lands have not been enhanced in value by reason of their proximity to the said city of Hammond, and that if they should eventually be included within the boundaries of the said city, their value would be greatly impaired and diminished; that the sale thereof would be greatly hindered if not rendered impracticable and impossible by reason of the heavy and excessive taxes imposed upon them by said city, and it may be reasonably expected that the lands themselves would eventually be taken and sold to satisfy said taxes. What this attempted extraordinary and unreasonable enlargement of the boundaries of the said city was not needed for roads, streets or alleys, or for the carrying out of any city improvements, or for any legitimate city purpose whatever; that the same was unnecessary and uncalled for by the wants of the said city or by the wants or wishes of the inhabitants and property-owners included within the new territory, whose property would be greatly diminished in value thereby, and that the
5 peace, good order, tranquility or prosperity neither of the said city nor of the said territory did not require that said territory should be brought under the municipal control of the

said city. That said attempted enlargement was an abuse and violation of the franchises of the said city, and a contemplated fraud upon the law of the State of Indiana granting to cities the right to annex a reasonable quantity of contiguous lands when said lands are needed for legitimate city purposes, or when the same are so benefited or enhanced in value by their proximity to corporate municipalities that they ought in justice to share the burdens of the government thereof. That said attempt was dictated, above all, by covetousness and greed, and a corrupt desire on the part of the authorities of the said city to subject the land and property of your oratrix in the new territory, and others similarly situated, to the burdens of taxation by said city for the sole benefit of the said city, and to raise means to pay off its heavy indebtedness, and thereby relieve the inhabitants of the original and proper city from a portion of the said indebtedness without rendering any service, advantage or benefit whatever to the new subjects of taxation. This complainant further avers that at the time said annexation proceedings were commenced, and even since the said city of Hammond had a municipal debt amounting to nearly or quite twice the constitutional limit, being in the neighborhood of four (4) per cent., and the purpose of said annexation was, by taking into the city limits new property at an exaggerated valuation, to so increase the appraised taxables of said city as to lift said city out of said constitutional dilemma without any regard whatever to the question of benefits or advantages to the property so pretended to be annexed; and that if said pretended annexation be allowed to stand, and said tax levy to be enforced, it will be the means of injustice and oppression to your oratrix and others, and her and their property and money will be taken for the sole benefit of another without compensation—without due process of law and in violation as well of the constitution of the State of Indiana as of the 14th article of the amendments to the Constitution of the United States.

And your oratrix further says that, at the time of the institution of the said proceedings for the annexation of the said territory a strip of land lying on the south thereof and adjoining the northern boundary of the said city of Hammond, about a quarter of a mile wide and extending from the western boundary of the city of East Chicago, westward to the State line, had been, by and with the consent of the owners thereof, annexed to the said city of East Chicago, and was then wholly under the jurisdiction, control and government of the said last-named city, thus separating and entirely
6 interrupting and cutting off the contiguity of the boundaries of the said city of Hammond to the territory thus sought to be annexed.

That for this reason, and for the further reason, that parts of the said territory sought to be annexed had been laid off into lots and blocks, mapped and platted, as aforesaid, the said board of commissioners had no jurisdiction whatever over said proceeding on the part of the said city of Hammond to annex said territory, and that said pretended annexation was and is wholly invalid, null and void.

To the end, therefore, that your oratrix may have that relief which she can only obtain in a court of equity, and that the said defendants may answer the premises, but not upon oath or affirmation, the benefit whereof is hereby expressly waived by your oratrix, and that the said defendant, The City of Hammond, may be perpetually enjoined from collecting or attempting to collect said taxes by or through its officers or agents, or in any other manner whatever; that said pretended annexation may be pronounced, adjudged and decreed null and void; that the said City of Hammond and its officers and agents may be perpetually enjoined from entering upon or assuming any jurisdiction whatever over the said lands of your oratrix, and that your honors may grant such further or other relief as the nature and circumstances of this case may require and to your honors seem meet.

May your honors grant unto your oratrix a writ of subpœna, to be directed unto the said City of Hammond and the said William Kleihege, treasurer of the said city, commanding them and each of them to appear before your honors and make full, true, direct and perfect answer to all and singular the premises, and further to stand to and abide such further order, direction and decree therein as to your honors may seem meet.

Your oratrix further prays that in the meantime the said defendants and each of them may be restrained by the order and injunction of this court from proceeding or attempting to proceed in any manner whatever to collect or receive said taxes or any part thereof and your oratrix will ever, etc.

THOS. J. MERRIFIELD,
MILLER, WINTER & ELAM,
Solicitors for Complainant.

7 STATE OF ILLINOIS, } ss:
County of Cook, }

Jacob Forsyth, being duly sworn, says that the matters and things set forth and alleged *and* the foregoing bill are true in substance and in fact, as he verily believes. Affiant further says that he is the husband and agent of Caroline M. Forsyth, the complainant in the foregoing bill, and that he has personal knowledge of the facts stated in said bill, whereas said Caroline has knowledge of many of said facts from information and belief only. He therefore, at her request, makes this affidavit in her behalf.

JACOB FORSYTH.

Subscribed and sworn to before me, Noble C. Butler, clerk U. S. district court, district of Indiana, this 30th day of April, A. D. 1895.

NOBLE C. BUTLER, *Clerk.*

And now comes the defendants by Peter Cumpacker, Esq., their solicitor, and file their application for a continuance of the complainant's motion for an injunction herein, which application is in the words following, to wit:

Application for Continuance.

Come now the defendants and move the court for a continuance of the hearing of plaintiff's application for a special injunction in the above-entitled cause, for the following reasons: That on Saturday, April 27th, defendants received notice of said application, which is herewith filed and made a part hereof; that at said time their attorney, Peter Cumpacker, was absent at the city of Indianapolis, and did not return until Sunday, the 28th day of April, 1895, that defendants have no knowledge whatever of the character of plaintiff's bill, nor what, if any preparation it will require to meet the application for a special injunction. They further say that they have written to the clerk of said court for a copy thereof, whereby they may ascertain the cause of complaint. They further say that the said Cumpacker is city attorney for the city of Hammond, Indiana, and that as such, it is his duty to look after the defense of both of these defendants in said cause, as nearly as they can anticipate the nature of the action; that the Lake circuit court is now in session; that said Cumpacker is busily engaged in the said Lake circuit court, and has causes set on each day of this week; that it will be impossible for him to attend and contest the said application any day this week for said reasons; that the causes in which he is engaged are jury cases, and that he cannot leave to attend to the said application for an injunction without great damage to
8 his clients whose cases come on for trial this week; that he has one case to be tried before the jury in said Lake circuit court on the 30th day of April and the date fixed in said notice for a hearing of said application and has several rules against clients to discharge on said day in said court and it will be impossible for him to attend the hearing of said application on said day without much and irreparable damage to his clients in said cause pending in said Lake circuit court; that he cannot procure a continuance in said matters in said Lake circuit court.

Defendants further say that they apprehend, but do not know that the said bill is to enjoin the collection by the defendant treasurer of certain taxes taxed against the plaintiff and plaintiff's property in the city of Hammond and they aver that plaintiff's said property is within the city of Hammond and that it was duly annexed thereto by a judgment of the Porter circuit court of Indiana rendered some time in the summer of the year 1893, that the said plaintiffs Caroline M. Forsyth and others appealed from the said decision of said Porter circuit court to the supreme court of Indiana; that the said supreme court on April 11, 1895, affirmed the decision of said Porter circuit court annexing the territory and the land of plaintiff as a part of said city of Hammond. Defendants say that they believe that the plaintiff is not entitled to a restraining order or any special injunction; that they believe if they have an opportunity so to do, and that if the said hearing is continued for a reasonable time they will be able to show to the honorable judge of said court before whom said application will be

presented that the plaintiff is not entitled to any relief in equity nor to any restraining order.

They further say that whatever taxes may be charged against plaintiff are past due or delinquent; that there are no immediate proceedings or steps being taken by distraint or levy or any other mode to make immediate collection upon any of plaintiff's property for her taxes; that defendants are willing to let any matter pertaining to the collection of plaintiff's taxes rest for a reasonable time, and for a sufficient time that such application can be heard; that the granting of a restraining order to this plaintiff would cause the defendant City of Hammond much trouble and embarrassment; that a large number of other property-owners who are alike situated to plaintiff would in the event that a temporary restraining order is granted, refuse to pay their taxes; that thereby the treasurer of said city would be impoverished, and the payment of said city's legitimate outstanding obligations would be delayed; that if
9 a restraining order is granted, it is the belief of defendants that it would induce a large number of other property-owners to bring like suits, wherefore defendants ask time until May 11, 1895, in which to answer plaintiff's bill, and which to make a showing therein, and they say that they believe that if said matter is continued until said date they can make such showing as that will result in the refusal of the honorable judge of said court to grant any injunction or restraining order whatever. They make the above statements without any knowledge of what the facts are in plaintiff's bill, but as they anticipate and surmise them to be, and not for delay merely, but that justice may be done.

CITY OF HAMMOND,
By PETER CRUMPACKER,
City Attorney.
WM. KLEIHEGE,
By PETER CRUMPACKER, *Attorney.*

STATE OF INDIANA, } ss:
Lake County, }

Peter Crumpacker, being sworn, on oath says that he is city attorney for The City of Hammond, defendant in the above-entitled cause, and that he is also the attorney for the defendant, William Kleihege in all matters that pertain to his official business, and that involve him as treasurer where he is not the real party in interest, but is only made a party by virtue of his office; that affiant dictated the aforesaid application for a continuance of said cause; that the same is true in fact so far as he has personal knowledge thereof, and as to the other, he states to be true upon the best information he is able to obtain, and upon his belief.

PETER CRUMPACKER.

Subscribed and sworn to before me this 29th day of April, 1895
[SEAL.] ERNEST S. SHORTRIDGE,
Notary Public.

10 In the Circuit Court of the United States for the District of Indiana.

CAROLINE M. FORSYTH
vs.
THE CITY OF HAMMOND; WILLIAM KLEIHEGE, as Treasurer of said City. } In Chancery.

To said defendants:

You and each of you are hereby notified that on Tuesday, the 30th day of April, 1895, at ten a. m. of said day, or as soon thereafter as the same can be heard, the plaintiff will make application to the Hon. John H. Baker, one of the judges of said court, at his chambers in the city of Indianapolis, Indiana, and move for a special injunction in the above-entitled cause; when and where you may appear and resist the same, if you see fit.

THOS. J. MERRIFIELD,
Of Counsel for Complainant.

And afterwards, to wit, at the November term of said court, on the 1st day of May, 1895, before Honorable John H. Baker, judge of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the complainant, by counsel, and files her amended bill of complaint herein, in the words following, to wit:

Amended Bill of Complaint.

To the judges of the circuit court of the United States for the district of Indiana:

Caroline M. Forsyth, of the city of Chicago, and a citizen of the State of Illinois, brings this her bill against The City of Hammond and William Kleihege, the treasurer of the said city, both of whom are citizens of the State of Indiana, and thereupon your oratrix complains and says:

That she is the owner and seized in fee of the tracts and parcels of land in the county of Lake and State of Indiana as follows:

Lots 2 and 3 and part of lot 1, in section 1, township 37, range 10 west.

Lots 1, 2, 3, and 4, in section 12, same township and range.

The north ½ of lot 1, in section 13, same town. and range.

11 Lots 1 and 2, in section 7, same town., range 9.

Lots 3 and 4, in same section, town. and range.

West ½ of the N. W. ¼ and the S. E. ¼ of the N. W. ¼ of section 7, town. 37, range 9.

Part of lot 1, in section 18, same town. and range; part of fractional N. W. ¼ S. of the P., Ft. W. & C. R'y, in section 6, town. 37, range 9.

W. ½ of the S. W. ¼ of the same section, town. and range. Containing in all about 725 acres.

That by a proceeding instituted at the June, 1893 session of the

board of commissioners of Lake county, Indiana, and from thence carried by appeal to the Lake circuit court, and from thence transferred by change of venue to the Porter circuit court of Indiana, the said City of Hammond pretended to annex, and now claims to have annexed said lands of your oratrix, together with a large body of other lands, to the territory of the said city, and the said city now claims and pretends to exercise jurisdiction over the same, and to have the right to assess said lands and the personal property thereon for taxation, and to levy and collect taxes on the same as well to aid in payment of the past and present indebtedness of the said city as to carry on the future government thereof. That the said city in pursuance and assertion of its said claim has by its officials levied taxes for the year 1894 against the said lands and personal property thereon of your oratrix to the amount of $3,500, and that the said William Kleihege, who is the treasurer of the said city, is, in his official capacity proceeding and threatening to collect the same by the sale of said land as well as by levy, distress and sale of the personal property of your oratrix, and will proceed so to collect the same unless restrained therefrom by order of the court.

That the whole of the said land of your oratrix is used solely by your oratrix for pasturage and hay and other agricultural purposes; that the rental value of the said lands does not exceed $100 per acre, and the said lands have no market value, but whatever value said lands have is speculative and prospective, dependent upon the location yet unsecured of manufacturing establishments there, whose market and offices are in Chicago, Illinois, and in no degree helped in the neighborhood of Hammond, but, as matter of fact, the taxation of said lands in the city of Hammond will render said lands unsalable and of very little value; that no part
12 of the said land has ever been mapped off or platted with a view to sale of such, nor does your oratrix contemplate doing so; that on all said lands of your oratrix there are but twenty-one dwelling-houses, ten of them being in a row together, and near to—about one-fourth of a mile—the town of Whiting, in said county of Lake, containing from 2,500 to 3,000 inhabitants, a town of rapid growth and great business activity and prosperity, and that tenants of said ten houses do business and work and labor in said town, and the rest of said houses on said land are in clusters of two and three, which clusters are widely apart; that the houses on said lands are four and one-half miles distant from any police station, fire-engine house or gas lamp of the city of Hammond, so that, in the nature of things, she cannot receive any service, advantage or benefit whatever from the municipal government of the said city. That said lands were valued for taxation by said city at the rate of $250 to $500 per acre, and that said taxes amount to about $5 per acre; that said valuation is enormously in excess of the real value of the said lands, and that said taxes are exorbitant, oppressive and extortionate.

Your oratrix further says, that at the time said attempted annexation proceedings were instituted, the said city of Hammond

contained, and still contains, not more than 6,000 or 7,000 inhabitants, and that it had territory about three miles long north and south, and about two miles wide east and west, extending on the west to the State line. The most populous portion of the city was and is on the extreme western line, or on the boundary line of the State of Indiana and the State of Illinois, beginning about one-fourth of the way from the northern boundary of the said city, and extending thence to the southern boundary thereof. The northern frontier of the said city, prior to the said alleged annexation, consists of sections 24 and 19, or about two square miles of land, neither of which, nor any part thereof, have ever been laid off into lots or blocks; the one not having a single house or road upon it, and the other having but seven houses and one road at the time such proceedings for annexation were instituted as aforesaid; said vacant lands lying between the settled parts of said city and the said lands of this complainant; that the part of Hammond laid off into lots is much larger than is now or likely to be required for city purposes for many years to come, and that its present boundaries contain nearly 4,000 acres, capable of conveniently containing and accommodating a population of almost a million of people. That the said city has a large bonded indebtedness, exceeding, as your oratrix is informed and believes, the sum of $100,000; that she has been unable to ascertain the
13 exact amount of its floating indebtedness, but, according to the best information she has been able to obtain, such indebtedness is not less than $60,000, and that the total taxable- of the city proper amount in all to little more than $400,000. That the territory attempted to be annexed consists of about five square miles of practically vacant lands, lying directly north, and extending all the way from the southern limits of the city of Hammond to the shore of Lake Michigan. Immediately on the north and overlapping somewhat the limit of the city are two lakes—Wolf lake and Lake George—shallow and having shores of a marshy nature. Between these two lakes is a narrow neck of land, low and swampy, extending north and south, the narrowest point of said neck being about 450 feet wide at the northern limits of Hammond, and widening to about 2,100 feet at the northern shore of Lake George, being in length about one mile. Along this neck or isthmus is the only direct route from the city of Hammond to the property of value sought to be annexed, the most populous and most valuable portion of which lies in the very northern part of the tract and near the trunk lines of the railroads that skirt the shore of Lake Michigan and near to the city of Chicago. The distance from the business portion of the city of Hammond to this part of the territory is between four and five miles, and the only means of connection between the two is a low, bad and muddy road along and over said narrow isthmus or neck of land. That previous to said attempted annexation one, Agnes Roberts, had laid out into town lots and mapped and platted about twenty acres in the northeast part of the said territory and adjoining the said town of Whiting in said Lake county, solely with reference to said town and without any reference

whatever to said city of Hammond, lying between four and five miles away; and that before the said attempted annexation Edward Roby and Edward A. Shedd had laid off and platted two tracts of land, amounting in all to thirty-five acres, in the northwest part of the territory sought to be annexed into lots, which they denominated Roby & Shedd's addition to Chicago in Indiana, and said lots were so platted with reference to South Chicago and the Roby race-track, and had no reference whatever to the city of Hammond, distant therefrom about five miles. That the whole of said territory sought to be annexed, except the parts platted as aforesaid, consists in part of sand ridges and sloughs; all of that which is not vacant is used for pasturage and agricultural purposes solely; that the same is very sparsely and thinly settled and inhabited; that the dwelling-houses and buildings thereon, except a very small portion thereof in said northeast corner, are widely separated from
14 one another; that the inhabitants thereof have no need whatever of municipal government, and that, from the nature of the situation it is utterly impossible that they should derive any advantage or benefit whatever from being included within the corporate boundaries of the said city of Hammond and burdened with heavy taxation thereby; that said lands have not been enhanced in value by reasons of their proximity to the said city of Hammond, and that if they should eventually be included within the boundaries of the said city their value would be greatly impaired and diminished. The lands most remote from Hammond are the most valuable, and their value increases with the distance from Hammond. That the sale thereof would be greatly hindered, if not rendered impracticable and impossible by reason of the heavy and excessive taxes imposed upon them by said city, and it may be reasonably expected that the lands themselves would eventually be taken and sold to satisfy said taxes. That this attempted extraordinary and unreasonable enlargement of the boundaries of the said city was not needed for roads, streets or alleys or for the carrying out of any city improvements or for any legitimate city purposes whatever; that the same was unnecessary and uncalled — by the wants of the said city or by the wants or wishes of the inhabitants and property-owners included within the new territory whose property would be greatly diminished in value thereby and that the peace, good order, tranquil-ity or prosperity either of the said city *nor* of the said territory did not require that said territory should be brought under the municipal control of the said city. That said attempted enlargement was an abuse and violation of the franchise of the said city and a contemplated fraud upon the law of the State of Indiana granting to the cities the right to annex a reasonable quantity of contiguous land when said lands are needed for legitimate city purposes or when the same are so benefited or enhanced in value by their proximity to corporate municipalities that they ought in justice to share the burdens of the government thereof. That said attempt was dictated above all by covetousness and greed, and a corrupt desire on the part of the authorities of the said city to subject the land and property of your oratrix in the new territory, as well

as that of others similarly situated to the burdens of taxation by said city for the sole benefit of the said city, and to raise means to pay off its heavy indebtedness, and thereby relieve the inhabitants of the original and proper city from a portion of the said indebtedness without rendering any service, advantage or benefit whatever to the new subjects of taxation.

This complainant further says that at the time said annexation proceedings were commenced, and ever since the said city of Hammond had a municipal debt amounting to nearly or quite twice the constitutional limit, being in the neighborhood of four per cent., and the purpose of said annexation was by taking into the city limits new property at an exaggerated valuation, to so increase the appraised taxables of said city as to lift said city out of said constitutional dilemma, without any regard whatever to the question of benefits or advantages to the property so pretended to be annexed.

The complainant avers that said city of Hammond is not only thus attempting to levy and collect taxes on said lands for municipal purposes, but is about to commingle said moneys so collected with the other funds of said city, and to use the same in payment of its said debts so accumulated in excess of the constitutional limit, and in the payment or ordinary municipal expenses, such as lighting, street-making, police and fire protection and water, but no part of the city funds is or is to be expended in such municipal benefits on this complainant's property, but the same is as completely without lights, water, streets, police and fire protection as before said pretended annexation proceedings were commenced.

The complainant avers that in the proceeding heretofore recited for the annexation of said premises to the city of Hammond, the decision and judgment of the board of commissioners of Lake county was against said annexation, and against the said city of Hammond and in favor of this complainant's and others' remonstrance before said board; and thereupon the said city of Hammond undertook to appeal from said decision to the Lake circuit court, and did file a transcript of said proceedings in said last-named court, and thereafter a pretended change of venue having been taken from said Lake circuit court to the Porter circuit court, a pretended trial by jury was had in said last-named court upon said question of annexation, resulting in a verdict and judgment in favor of said annexation and against said remonstrance, including this complainant for costs.

But this complainant avers that she is advised and therefore charges the fact and the law to be that said appeal from said board of commissioners to Lake circuit court was without warrant of law, unauthorized and the proceedings therein had void, for that the annexation of territory to a city is a matter of legislative and not of judicial cognizance, and it was not competent for the legislature to commit the determination of the question to the courts and juries, and she further alleges that the pretended change of venue from the Lake to the Porter circuit court was without

16 warrant of law, and conferred upon said last-named court no jurisdiction in the premises.

And your oratrix further says that at the time of the institution of the said proceedings for the annexation of the said territory, a strip of land lying on the south thereof and adjoining the northern boundary of the said city of Hammond, about a quarter of a mile wide and extending from the western boundary of the city of East Chicago westward to the State line, had been by and with the consent of the owners thereof annexed to the said city of East Chicago, and was then wholly under the jurisdiction, control and government of the said last-named city, thus separating and entirely cutting off the contiguity of the boundaries of the said city of Hammond to the territory thus sought to be annexed.

That for this reason and for the further reason that parts of the said territory sought to be annexed had been laid off into lots and blocks, mapped and platted as aforesaid, the said board of commissioners had no jurisdiction whatever over said proceeding on the part of the said city of Hammond to annex said territory, and that the said pretended annexation was, and is, wholly invalid, null and void.

To the end, therefore, that your oratrix may have that relief which she can only obtain in a court of equity, and that the said defendants may answer the premises, but not upon oath or affirmation, the benefit whereof is expressly hereby waived by your oratrix, and that the said defendant, The City of Hammond, may be perpetually enjoined from collecting or attempting to collect said taxes by or through its officers or agents, or in any other manner whatever, that said pretended annexation may be pronounced, adjudged and decreed null and void; that the said City of Hammond and its officers and agents may be perpetually enjoined from entering upon or assuming any jurisdiction whatever over the said lands of your oratrix, and that your honors may grant such further or other relief as the nature and circumstances of this case may require and to your honors seem meet.

May your honors grant unto your oratrix a writ of subpœna to be directed unto the said City of Hammond and the said William Kleihege, treasurer of the said city, commanding them and each of them to appear before your honors and make full, true, direct and perfect answers to all and singular the premises, and further to stand to and abide such further order, direction and decree therein as to your honors may seem meet.

17 Your oratrix further prays that, in the meantime the said defendants and each of them may be restrained by the order and injunction of this court from proceeding or attempting to proceed in any manner whatever to collect or receive said taxes, or any part thereof, and your oratrix will ever, etc.

THOS. J. MERRIFIELD,
MILLER, WINTER & ELAM,
Solicitors for Complainant.

STATE OF INDIANA, }
County of Marion, } ss:

Jacob Forsyth, being duly sworn, says that the matters and things set forth and alleged in the foregoing bill are true in substance and in fact as he verily believes. Affiant further says that he is the husband and agent of Caroline M. Forsyth, the complainant in the foregoing bill, and that he has personal knowledge of the facts stated in said bill, whereas said Caroline has knowledge of many of said facts from information and belief only. He, therefore, makes this affidavit in her behalf.

JACOB FORSYTH.

Subscribed and sworn to before me, H. W. Phillips, a notary public, in and for said district, county and State, this 1st day of May, A. D. 1895.

[SEAL.] H. W. PHILLIPS,
Notary Public.

18 And afterwards, to wit: at the May term of said court, on the 3d day of July, 1895, before Honorable John H. Baker, judge of said court, the following further proceedings in the above-entitled cause were had, to wit:

Decree. Entered July 3, 1895.

Come now the parties, the complainant by Thomas J. Merrifield and Miller, Winter & Elam, her solicitors, and the defendants by Peter Crumpacker their solicitor, and this cause having been submitted to the court upon the bill of complaint, amended bill of complaint, application for injunction, briefs and argument of counsel, and the court having duly considered the same and being sufficiently advised in the premises, denies the application of the complainant for an injunction herein, and finds that the equity of this cause is with the defendants.

It is therefore ordered, adjudged and decreed by the court *and* that the application of the complainant for an injunction herein be and the same is hereby denied, and that the bill of complaint and amended bill of complaint herein be, and the same are hereby dismissed for want of equity.

And it is further ordered, adjudged and decreed that the complainant do pay to the defendants their costs herein expended, taxed at $—.

And afterwards, to wit: at the May term of said court, on the 13th day of July, 1895, before Honorable John H. Baker, judge of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the complainant by counsel and files her petition for appeal, assignment of errors and bond herein, in the words following, to wit:

In the Circuit Court of the United States for the District of Indiana.

CAROLINE M. FORSYTH
vs.
CITY OF HAMMOND *et al.* } No. 9215. In Equity.

BAKER, *District Judge:*

This is a suit to enjoin the collection of taxes levied for city purposes by the defendant city on the lands of the complainant. The question for decision is the sufficiency of the bill to entitle the complainant to the equitable relief for which she prays. The sufficiency of the bill depends upon the answers to be given to two questions:

First. Were the proceedings and judgment of the circuit court of Porter county, Indiana, which adjudged the annexation of certain lands, including the complainant's, to the city of Hammond, illegal and void, or were they valid?

It is contended that the judgment annexing the lands of the complainant and others to the city of Hammond is void because the creation and enlargement of municipal bodies are purely political questions to be decided by the legislature, and not judicial, to be determined by the courts, and hence that the legislature cannot confer upon the courts power or authority to adjudge or decree the annexation of territory to a municipal body. It is not denied that the legislature has attempted to confer such power upon the courts, but the contention is that the question of the enlargement of the limits of a municipal body is purely a political question, and that under the constitution of the State no power except judicial can be conferred, upon a number of authorities in support of their contentions, which we here cite: Dillon on Municipal Corporations, sec. 9; 1 Beach on Public Corporations, sec. 80; Stone *v.* Charlestown, 114 Mass., 220; People *v.* Bennett, 29 Mich., 451; Galesburg *v.* Hawkinson, 75 Ill., 152; People *v.* Town of Nevada, 6 Cal., 143.

It must be conceded that these authorities, to which others might be added, do hold that the legislature of a State cannot confer power upon the courts to change the boundaries of such municipal
20 bodies as cities or towns by annexing territory to, or disconnecting it from them, because such acts are in their essential nature legislative and political, not judicial; that the same power cannot be either legislative or judicial, as the legislature may be disposed to retain it or surrender it to the judiciary; and that as it is a legislative power, the courts cannot be invested with it. It is said that whether a city, town or village shall be incorporated, and if incorporated, whether enlarged or contracted in its boundaries, presents no question of law or fact for judicial determination. It is, so it is said, purely a question of policy to be determined by the legislative department.

I should perhaps feel constrained to yield to the force of the rea-

soning of these authorities if the constitution of this State conferred power on the legislature to create such municipal bodies, or to enlarge or contract their boundaries by the enactment of special laws applicable to each particular municipal body. Such power, however, is denied to the legislature by the constitution of the State; the constitution requires the organization of cities and towns, and the enlargement or contraction of their boundaries to be provided for and regulated by general laws. These laws, in the nature of things, must be prospective, and must specify the conditions on the happenings of which such creation, enlargement or contraction may be made, and must provide some tribunal to determine the existence of these conditions. The power to hear and determine whether the conditions prescribed by law for the creation, enlargement or contraction of a municipal body exist, is judicial in its nature, and may be appropriately conferred upon the courts. The creation, enlargement or contraction of a municipal body is not the act of the court, but is the act and result of the law. The court simply determines whether the conditions are present which authorize the creation of a municipal body or the enlargement or contraction of its limits, and when these conditions are judicially ascertained the law, *ex proprio vigore* creates the municipal body or enlarges or contracts its boundaries. The constitution of the State compels the legislature to confide this power to some tribunal, and to none could it more appropriately have been confided than to the courts. It is a legitimate function of courts to ascertain and determine the existence or non-existence of a given state of facts. The legislature is required, as we have seen, to provide by general laws for the creation of municipal bodies and for the enlargement and contraction of their boundaries; and no limitation has been placed upon the power of the legislature to confer upon any tribunal it may select the authority to determine when the conditions
21 are present which shall create, enlarge or contract municipal bodies. The power of the legislature in this regard being unlimited, it may exercise its own discretion in confiding to any tribunal it pleases the power to determine the existence of the conditions which shall give effect to the general law touching the enlargement of municipal bodies.

It is thoroughly well settled that many legislative enactments are valid and constitutional which became operative upon persons and property within defined territorial limits on the happening of some future contingency. Among such enactments are laws providing for aid in the construction of railroads and other public improvements whose operation is made dependent on the petition or vote of the electors or tax-payers of a specified locality. So also local option laws making the sale of intoxicating liquors within certain territorial limits lawful or unlawful are made dependent on the vote or petition of a certain number of electors in such localities. These enactments only become operative on the happening of conditions which must be ascertained and determined by some tribunal in the manner appointed by law. It is not perceived why the ascertainment and determination of the condition upon which the law shall

become operative within given territorial limits may not be committed to the courts. In my judgment the legislature possessed the constitutional power to confer jurisdiction on the courts to hear and determine whether or not the requisite conditions exist to justify the annexation of territory to a municipal body.

The decisions of the supreme court of this State are in harmony with these views. While this precise question has been but seldom referred to, the supreme court has in cases too numerous to justify citation, by taking appellate jurisdiction, recognized the power of the courts to hear and determine the questions confined to them by the statute providing for the incorporation of cities and towns. In the case of Grusenmeyer *v.* City of Logansport, 76 Ind., 549, the court expressly affirmed the jurisdiction of the courts to hear and determine these questions; and the court there declared that these questions were judicial in their nature. This case has been cited and approved in many more recent decisions of the court. The question must be regarded as settled in this jurisdiction adversely to the contention of complainant's counsel. Besides, the supreme court of the State, in the recent case of Forsyth *v.* City of Hammond, 40 N. E. Rep., 267, has decided that the annexation of the lands of the complainant and others to the city of Hammond was lawfully made; and this court possesses neither the disposition nor
22 the power to declare the annexation of the territory in question invalid. The decisions of the supreme court of the State on questions of local law are binding and conclusive on this court.

Second. It is insisted that it is evident from the facts stated in the bill that the enlargement of the boundaries of the city of Hammond over large tracks of farm and vacant lands did not have its origin in the legitimate needs of the city, but in the desire to impose the burdens of taxation upon property beyond the limits of the city *de facto*, as indicated by houses, streets or other urban improvements, and without any ability or intention on the part of the city to make any compensation for the taxes so levied and collected. It is said that this is an abuse of the law and an act of injustice and oppression from which the courts may relieve; that it is violative of the constitutional guaranty which forbids the taking of private property for public use without making just compensation therefor; and that independently of this constitutional guaranty there is a fundamental principle of right and justice in the nature and spirit of all constitutional governments which the legislature may not disregard without overpassing its rightful authority.

By the constitution the whole legislative power of the State is vested in the General Assembly. When, therefore, an act of the General Assembly is passed which violates no provision of the State or Federal Constitution the courts cannot declare it void on the ground that it is wrong, unjust or oppressive, or on the ground that it violates the genius or spirit of our institutions. (Welling *v.* Merrill, 52 Ind., 350; Churchman *v.* Martin, 54 Ind., 380; City of Logansport *v.* Seybold, 59 Ind., 225.) Courts would find themselves upon a shoreless sea with neither chart nor compass to direct their course if they should undertake the task of declaring statutes invalid be-

cause of their supposed conflict with the principles of natural justice or because they were supposed to be violative of the spirit of constitutional governments. Other remedies must be invoked and applied for the correction of such evils, if they should arise.

The tax levy sought to be restrained does not conflict with the constitutional provisions invoked. This is settled so far as the constitution of this State is concerned by the case of City of Logansport *v.* Seybold, 59 Ind., 225, and so far as the Constitution of the United States is concerned by the case of Kelly *v.* Pittsburgh, 104 U. S., 78. This court cannot say, however great the hardship or unjust the burden, that the tax in question is the taking of property of the complainants without due process of law, or without just compensation.

23 It is claimed that the indebtedness of the city of Hammond is in excess of the constitutional limit, and that it is proposed to apply the taxes when collected to the payment of such unlawful indebtedness. But this affords no excuse for the complainant's failure to pay her taxes. If when these taxes are paid the city authorities shall undertake to apply them to the payment of invalid or illegal obligations, it will be time for the complainant to invoke the aid of the court to restrain such misappropriation of the corporate funds.

The injunction will therefore be denied, and the bill dismissed for want of equity at complainant's costs.

Petition for Appeal and Assignment of Errors.

The complainant in the above-entitled cause, Caroline M. Forsyth, respectfully prays that she may be allowed an appeal from the decree entered herein by this court on the 2d day of July, 1895, dismissing her bill for want of equity to the circuit court of appeals for the seventh circuit, and she tenders herewith her bond in the penalty of five hundred dollars, with Charles B. Shedd as surety, and she herewith submits the following assignment of errors:

1. The circuit court erred in refusing to grant the injunction as prayed in said bill.

2. The circuit court erred in holding that the statute of the State of Indiana, authorizing an appeal from the decision of the board of commissioners refusing to annex the territory in dispute to the city of Hammond to the circuit court, was a valid statute.

3. The circuit court erred in holding that the power to annex territory to a municipal corporation under the constitution of Indiana is a judicial and not a legislative power.

4. The circuit court erred in holding that said *will* did not state a cause of action in equity.

5. The circuit court erred in dismissing said bill for want of equity.

Wherefore she prays that said decree dismissing said bill be reversed.

THOS. J. MERRIFIELD,
MILLER, WINTER & ELAM,
Solicitors for Caroline Forsyth.

Appeal granted and bond approved July 13, 1895.

JOHN H. BAKER, *Judge.*

24 *Appeal Bond.*

United States Circuit Court for the District of Indiana.

CAROLINE M. FORSYTH
vs.
CITY OF HAMMOND and WILLIAM KLEIHEGE, Treasurer. } No. 9215. In Chancery.

Know all men by these presents, that we, Caroline M. Forsyth and Chas. B. Shedd, are held and firmly bound unto The City of Hammond and William Kleihege, treasurer, in the penal sum of five hundred dollars, for the payment of which we bind ourselves, our heirs and our personal representatives.

The condition of the above obligation is as follows:

Whereas, the above-named Caroline M. Forsyth has appealed from the final decree entered on the 2d day of July, 1895, in this suit, dismissing the appeal for want of equity, to the United States circuit court of appeals for the seventh circuit:

Now, if the said appellant shall prosecute her said appeal with effect, and pay all costs and damages that may be assessed against her in the premises, then this bond to be void, else in full force.

Witness our hands this 11th day of July, 1895.

CAROLINE M. FORSYTH.
CHARLES B. SHEDD.

Approved July 13, 1895.

JOHN H. BAKER, *Judge.*

And thereupon it is ordered by the court that the appeal be allowed as prayed, and that said appeal bond be, and the same is, hereby approved by the court.

25 *Citation.*

Chancery.

United States of America to The City of Hammond and William Kleihege, treasurer of said city, Greeting:

You are hereby cited and admonished to be and appear at a United States circuit court of appeals for the seventh circuit, to be holden at Chicago thirty days after the date hereof, pursuant to an appeal which has been allowed by the circuit court of the United States for the district of Indiana, from its final decree in a suit wherein Caroline M. Forsyth is appellant, and you are appellee-, to show cause, if any there be, why the decree rendered against the said appellant as in the said appeal, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. John H. Baker, judge of the district court of the United States for the district of Indiana, and *ex officio* judge of said circuit court, this 2d day of August, in the year of our Lord, one thousand eight hundred and ninety-five.

[SEAL.]

JOHN H. BAKER, *Judge.*

I hereby accept service of the above notice, this 3d day of August, 1895.

PETER CRUMPACKER,
Att'y for Appellees.

On this 5th day of August, in the year of our Lord, one thousand eight hundred and ninety-five, personally appeared Thos. J. Merrifield before me, the subscriber, and makes oath that he delivered a true copy of the within citation to the within-named William Kleihege and to Peter Crumpacker, the attorney of said appellees, on the 3d day of August, 1895.

THOS. J. MERRIFIELD.

Sworn to and subscribed the 5th day of August, A. D. 1895.

[SEAL.]

WILMA M. ROE,
Notary Public.

26 *Certificate of Clerk.*

UNITED STATES OF AMERICA, *District of Indiana,* } *ss:*

I, Noble C. Butler, clerk of the circuit court of the United States for the district of Indiana, do hereby certify that the above and foregoing is a full, true and complete transcript of the record in the cause of Caroline M. Forsyth *v.* The City of Hammond *et al.*, as fully as the same appears of record and remains on file in my office.

Witness my hand and the seal of said court at Indianapolis in said district, this 10th day of August, A. D. 1895.

[NOTARIAL SEAL.]

NOBLE C. BUTLER, *Clerk.*

27 WEDNESDAY, *Sept.* 25, 1895.

Before Hon. John W. Showalter, circuit judge.

CAROLINE M. FORSYTH, Appellant,
v.
CITY OF HAMMOND *et al.* } 264.

It is ordered by the court that the time allowed by the rules of this court in which appellant may file brief in this cause be, and the same is hereby, extended ten days.

MONDAY, *October* 7, 1895.

At a regular term of the United States circuit court of appeals for the seventh circuit, begun and held at the United States court-

rooms, in the city of Chicago, in said seventh circuit, on Monday, the seventh day of October, 1895, of said October term, in the year of our Lord one thousand eight hundred and ninety-five, and of our Independence the one hundred and nineteenth year.

Present: Hon. William A. Woods, circuit judge; Hon. James G. Jenkins, circuit judge; Hon. John W. Showalter, circuit judge.

CAROLINE M. FORSYTH, Appellant,
v.
CITY OF HAMMOND *et al.* } 264.

It is ordered by the court that this cause be, and the same is hereby, set down for hearing October 30, 1895.

WEDNESDAY, *October* 30, 1895.

Court met pursuant to adjournment.

Present: Hon. William A. Woods, circuit judge; Hon. James G. Jenkins, circuit judge; Hon. John W. Showalter, circuit junge.

CAROLINE M. FORSYTH, Appellant,
v.
CITY OF HAMMOND *et al.* } 264.

28 It is ordered by the court that the appellee- be, and *is* hereby, allowed fifteen days from this date in which to file brief in this cause.

CAROLINE M. FORSYTH, Appellant,
v.
CITY OF HAMMOND *et al.* } 264.

Now, this day, came the parties, by their counsel, and this cause now comes on to be heard on the printed record and briefs of counsel and on oral argument by Mr. W. H. H. Miller and Mr. Lyman Trumbull, counsel for appellant, and by Mr. Peter Crumpacker, counsel for appellee-, and the court, having heard the same, takes this matter under advisement.

SATURDAY, *November* 16, 1895.

Before Hon. William A. Woods, circuit judge.

CAROLINE M. FORSYTH, Appellant,
v.
CITY OF HAMMOND *et al.* } 264.

It is ordered by the court that the time allowed appellee- in which to file *his* brief in this cause be, and the same is hereby, extended three days.

THURSDAY, *January* 16, 1896.

Court met pursuant to adjournment.

Present: Hon. William A. Woods, circuit judge; Hon. James G. Jenkins, circuit judge; Hon. John W. Showalter, circuit judge.

29 United States Circuit Court of Appeals for the Seventh Circuit, October Session, 1895.

CAROLINE M. FORSYTH
vs.
THE CITY OF HAMMOND and WILLIAM KLEIHEGE, Treasurer.

No. 264. Appeal from the Circuit Court of the United States for the District of Indiana.

Before Woods, Jenkins, and Showalter, circuit judges.

The bill in this case was brought by Caroline M. Forsyth, a citizen of Illinois, against The City of Hammond, Indiana, and William Kleihege, treasurer of that city, to enjoin the collection of taxes levied upon lands of the complainant for the use of the city, and, after hearing and denial of a motion for an injunction *pendente lite*, was dismissed for want of equity. Forsyth *v.* City of Hammond, 68 Fed. R., 774.

The substance of the bill is: That the complainant is the owner of lands described, in Lake county, Indiana, to the number proximately of 650 acres; that by certain proceedings commenced before the board of commissioners of that county in June, 1893, and carried by appeal to the Lake circuit court and thence by change of venue to the Porter circuit court, the city of Hammond pretended to have annexed and now claims jurisdiction over and the right to assess for taxation, and for the year 1894 has levied taxes on the lands and personal property thereon to the amount of $3,500, which the treasurer is proceeding and threatening to collect; that the land is used solely for pasturage and other agricultural purposes, has a rental value not exceeding one dollar per acre, has no market value, but only a prospective and speculative value dependent upon the location yet unsecured of manufacturing establishments there whose market and offices are in Chicago, and is in no degree helped by the neigh-
30 borhood of Hammond, and by taxation there will be rendered unsalable and of little value; that no part of the land has been platted with a view to sale, and no such step is contemplated; that there are but twenty-one dwelling-houses on the land, ten of them being in a row together near Whiting, a town of rapid growth, containing 2,500 or 3,000 inhabitants, at which the tenants of the ten houses do business, or work; that the other houses on the land are in wide-apart clusters of two or three; that the houses on the land are four and one-half miles distant from any police station, fire-engine house, or gas lamp of Hammond, so that, in the nature of things, the complainant cannot receive any benefit from the government of that city; that the lands were valued for taxation by the city of Hammond at the rate of $250 to $500 per acre, making the taxes about $5 per acre, which is excessive, oppressive and extortionate. That at the time of the attempted annexation, Hammond contained and still contains not more than 7,000 inhabitants and had territory about three miles long north and south, and two miles wide, extending on the west to the State

line, adjoining which line is the most populous portion of the city, beginning about one-fourth of the way from the north line and extending to the southern boundary—the northern frontier of the city consisting of about two square miles of land, no part of which has been laid off into lots or blocks, and upon which there were but seven houses and one road when the attempt was made to annex complainant's lands which lie beyond and northward of the two square miles mentioned; that the part of Hammond laid off in lots is much larger than is now or is likely to be required for city purposes for many years to come; that (upon information) the city has a bonded debt of $100,000, and a floating debt of $60,000, and taxable property in the city proper of little more than $400,000; that the territory attempted to be annexed contains about five square miles of practically vacant lands, extending from the northern limit of Hammond to the shore of Lake Michigan; that immediately on the north and overlapping the limit of the city are two lakes—Wolf lake and Lake George—shallow and of marshy shores, between which is a narrow neck of low swampy land about a mile long, over which by a low and muddy road is the only direct route from Hammond to the property of value sought to be annexed, the most populous and most valuable portion of which lies in the northern part of the tract, near the trunk line of railroad along the shore of Lake Michigan, and near Chicago, and from four to five miles distant from the business portion of Hammond; that before the attempted annexation, twenty acres in the northeast corner of the land had been laid out in town lots and platted by Agnes Roberts with reference to the adjoining
31 town of Whiting, and without reference to Hammond, which is between four and five miles away, and two tracts, aggregating thirty-five acres in the northwest part had been laid off and platted by Edward Roby and Edward A. Shedd with reference to South Chicago, and denominated Roby & Shedd's addition to Chicago in Indiana; that except the parts so platted the lands sought to be annexed consist in part of sand ridges and sloughs, and are used for pasturage and agricultural purposes solely, being sparsely and thinly inhabited, the dwelling-houses and buildings thereon, except the small portion in the northeast corner, being widely separated from one another; that the inhabitants have no need of municipal government and from the nature of the situation can possibly derive no benefit from being included within the corporate boundaries and burdened with the taxation of Hammond; that the lands have not been enhanced in value by reason of proximity to Hammond and would be greatly impaired in value if brought within its limits, the sale thereof being greatly hindered, if not made impossible, by reason of the heavy and excessive taxes imposed; that this attempted extraordinary and unreasonable enlargement of the boundaries of the city was not needed for roads, streets, alleys or for any legitimate purpose, but was an abuse and violation of the franchise of the city, and a contemplated fraud upon the law of the State granting to cities the right to make reasonable annexations; that this attempt was dictated above all by covetousness and

greed and a corrupt desire on the part of the authorities of the city to subject the lands of complainant and others in the new territory to the burdens of taxation for the sole benefit of the city, to raise means to pay off its heavy indebtedness, relieving the inhabitants of the city proper, without rendering any service or benefit to the new subjects of taxation; that the debt of the city was and is about four per cent. of the valuation of its taxable property, or twice the amount limited by the constitution of the State, and the purpose was by annexing new property at an exaggerated value to lift the city out of its constitutional dilemma, without regard to the question of benefits or advantages to the property annexed; that the city is not only thus attempting to levy and collect taxes on said lands for municipal purposes, but is about to commingle the moneys so collected with other funds of the city, and to use the same in payment of its debts in excess of the constitutional limit and in the payment of ordinary municipal expenses, but no part of the city's funds has been or is to be expended for the benefit of complainant's property which is completely without lights, water, police and fire protection, as before the pretended annexation was had.

It is further averred that in the proceedings recited the
32 board of commissioners of Lake county refused to order the annexation prayed for, whereupon the city of Hammond undertook to appeal to the Lake circuit court whence there was a pretended change of venue to the Porter circuit court, which, upon the verdict of a jury, gave judgment in favor of the annexation; that the appeal and the change of venue were, as the complainant is advised, without authority and the proceedings thereon void for that the annexation of territory to a city is a matter of legislative and not of judicial cognizance, which it is not competent for the legislature to commit to the determination of courts and juries; that when the proceedings for annexation were begun, a strip of land lying between the territory to be added and the northern boundary of Hammond, about a quarter of a mile wide and extending from the western boundary of the city of East Chicago westward to the State line had been, with the consent of the owners thereof, annexed to and was then wholly under the jurisdiction, control and government of the last-mentioned city, thus separating and cutting off all contiguity of the boundaries of Hammond and the territory proposed to be annexed. Prayer, among other things, that the annexation be declared void and that the City of Hammond be enjoined from collecting taxes or otherwise asserting jurisdiction over the complainant's lands.

The proceedings for annexation were had under the following provisions of the act of March 14, 1867, touching the incorporation and powers of cities, the marginal numbers given referring to Burns' Revised Statutes of Indiana, 1894, and to the Revision of 1881, respectively:

SEC. 3659 (3196). * * * "If any city shall desire to annex contiguous territory not laid off in lots, and to the annexation of which the owner will not consent, the common council shall present to the board of county commissioners a petition setting forth the

reasons for such annexation, and at the same time present to such board an accurate description by metes and bounds, accompanied with a plat of the lands or territory proposed or desired to be annexed to such city. The common council shall give thirty days' notice, by publication in some newspaper of the city of the intended petition, describing in such notice the territory sought to be annexed."

SEC. 3660 (3197). "The board of county commissioners, upon the reception of such petition, shall consider the same, and shall hear the testimony offered for or against such annexation, and if after inspection of the map and of the proceedings had in the case such board is of the opinion that the prayer of the petition should be granted, it shall cause an entry to be made in the order book specifying the territory annexed, with the boundaries of the
33 same, according to the survey, and they shall cause an attested copy of the entry to be filed with the recorder of such county, which shall be duly recorded in his office, and which shall be conclusive evidence of such annexation in all courts of this State."

A right of appeal in such proceedings was given by the act of May 31, 1879, from which we quote the portions pertinent here:

SEC. 4224 (3243). "In proceedings before the board of county commissioners for the annexation of territory to cities and towns against the will of the owner, the petitioner and the owner of any portion of the territory proposed to be annexed, may appeal to the circuit court by filing within thirty days with the auditor, a bond," etc. * * *

SEC. 4226 (3245). * * * "The appeal shall be tried and determined as an original cause."

SEC. 4227 (3246). * * * "The court may make a final determination of the proceeding and compel its execution or may send its decision to the board with directions how to proceed, and require compliance."

The constitution of Indiana contains the following provisions:

Article 3: "The powers of the government are divided into three separate departments; the legislative, the executive, including the administrative, and the judicial; and no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in this constitution expressly provided."

Article 4, sec. 23: "In all the cases enumerated in the preceding section, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the State."

Article 11, sec. 13: "Corporations, other than banking, shall not be created by special act, but may be formed under general laws." This provision has been held to apply to municipal corporations. Wiley *v.* Bluffton, 111 Ind. 155.

Schedule, clause 4: "All acts of incorporation for municipal purposes shall continue in force under this constitution until such time as the General Assembly shall, in its discretion, modify or repeal the same."

WOODS, circuit judge, after making the foregoing statement, delivered the opinion of the court:

The authorities cited in support of the proposition that the power to establish municipal corporations and to enlarge or contract their boundaries is legislative are numerous and conclusive: Dillon,
34 Mun. Corp. sec. 9; Beach, Pub. Corp. vol. 1, sec. 80; Cooley, Const. Lim. (4th ed.) 232; Stone *v.* Charleston, 114 Mass. 220; People *v.* Bennett, 29 Mich. 451; Galesburg *v.* Hawkinson, 75 Ill. 152; People *v.* Town of Nevada, 6 Cal. 143; Stilz *v.* Indianapolis, 55 Ind. 515; Coffin *v.* State, 7 Ind. 157; Sloan *v.* State, 8 Blckf. 361; Laramie Co. *v.* Albany Co., 92 U. S. 310; Merryweather *v.* Garret, 102 U. S. 472.

And being a legislative power the rule in Indiana as in other States is, that it cannot be conferred upon or exercised by a court, whose functions are judicial. Wright *v.* Defrees, 8 Ind. 298; Shoultz *v.* McPheeters, 79 Ind. 373; State *v.* Noble, 118 Ind. 350; State *v.* Denny, 118 Ind. 382; Hovey *v.* State, 127 Ind. 588; State *v.* Colson, 130 Ind. 442; State *v.* Hayworth, 122 Ind. 462; Hancock *v.* Yaden, 121 Ind. 366; Greenough *v.* Greenough, 11 Pa. St. 487; Legal Tender cases, 12 Wall. 457.

It is contended, nevertheless, that since the decision in Grusenmeyer *v.* City of Logansport, 76 Ind. 549, the right of appeal from the board of county commissioners in such cases, under the Indiana statutes on the subject, has been regarded as established. That case, however, does not so decide nor contain anything to justify an inference to that effect; and in only one of the many cases since decided in which reference was made to that decision has it been so interpreted. It has been cited frequently as authority for the proposition that under the general statute which authorizes appeals from decisions of county boards there is a right of appeal from any decision of a judicial character, made in any proceeding by a board of commissioners. Bryan *v.* Moore, 81 Ind. 9; Board of Comm'rs *v.* Pressley, 81 Ind. 361; La Plante *v.* Lee, 83 Ind. 155; City of Indianapolis *v.* McAvoy, 86 Ind. 587; Miller *v.* Embree, 88 Ind. 133; Board *v.* Logansport &c. Co., 88 Ind. 199; Board *v.* Karp, 90 Ind. 541; Padgett *v.* The State, 93 Ind. 396; City of Terre Haute *v.* Beach, 96 Ind. 143; City of Logansport *v.* La Rose, 99 Ind. 117; Strosser *v.* Ft. Wayne, 100 Ind. 447; Waller *v.* Wood, 101 Ind. 138; Platter *v.* Board, 103 Ind. 360; Bunnell *v.* Board, 124 Ind. 1; Farley *v.* Board, 126 Ind. 469; Indiana Improvement Co. *v.* Wagner, 134 Ind. 698.

In none of these cases was there an appeal, or any question touching the right of appeal, from an order extending or affecting the limits of a city. In the last case the appeal was from an order of a board of commissioners, made in a proceeding to incorporate a town, that an election be held by the inhabitants of the territory to determine whether they would incorporate. The order was held to be not final and therefore not appealable, but in the course of the opinion it is said: "There was formerly some conflict in our decisions as to whether an appeal would lie from an order of a board

of county commissioners incorporating, or refusing to in-
35 corporate a town. But in the case of Grusenmeyer *v.* City of Logansport, 76 Ind. 549 that question was set at rest, and it is no longer a matter of doubt that such appeal does lie."

Grusenmeyer and others, according to the report of the case, presented a petition for the incorporation of the town of Taberville, but it being claimed that the territory had already been annexed to the city of Logansport the board of commissioners rejected the petition; the petitioners took an appeal to the circuit court where a motion was made, and sustained, to dismiss the appeal, and from that order an appeal was prosecuted to the Supreme Court, where counsel for the appellee, the city, advanced the following propositions: "1st. That the right of appeal is purely statutory; that the incorporation of towns is a special proceeding, under a statute which does not provide for an appeal; and that, under the doctrine of Allen *v.* Hostetter, 16 Ind. 15, no appeal is permissable. 2d. That, by section 10, article 6, of the constitution, 'the General Assembly may confer upon the boards doing county business in the several counties powers of a local administrative character;' and that the power to incorporate towns is such a power, to be exercised by the board in its legislative discretion, and that, from the exercise of such a power there can be no appeal. 3d. That there can be no appeal, because the circuit court cannot 'make a final determination of the proceedings thus appealed, and cause the same to be executed;' that the circuit court cannot give the notice, receive the returns nor declare the result of the election; that it is not a question before the court, or with which it has anything to do; it is a legislative act; and the court, having no power to move in the premises, cannot compel the board to do it." The authorities touching the first proposition are reviewed at length, but the others are disposed of briefly at the end of the opinion, where it is said: "We therefore hold, that, under section 31 of the general law, there is a right of appeal from any decision of a judicial character, made by a county board in any proceeding, unless the right is denied expressly or by necessary implication, and such implication does not arise from the fact that the judgment is declared to be conclusive. It can hardly be necessary to add that nothing is herein said or decided which can be construed to imply a right of appeal from the decisions of the boards upon matters of discretion. The second proposition of the appellant is disposed of by Taylor *v.* The City of Fort Wayne, 47 Ind. 274. The board has no discretion to grant or refuse the application, if the proper preliminary steps have been taken by the petitioners. The decision of the board, in such a case, is judicial, and not merely administrative or legislative. In answer to the
36 third proposition, it is enough to say that the circuit court, under its general powers, and under the 37th section of the act of June 17th, 1852, before referred to, has ample power to dispose of the case on appeal."

In Taylor *v.* Ft. Wayne, as in the cases of Grusenmeyer *v.* Logansport and Indiana Improvement Co. *v.* Wagner, the proceeding was under the act of May 11, 1852, (secs. 4314 (3293)—4322 (3301), re-

visions of 1894 and 1881), to incorporate a town. Under the provisions of that act the board of commissioners are given no discretion, except such as any court has in respect to the weight and sufficiency of evidence adduced, but, upon satisfactory proof of certain facts which must be set out in the petition, are required to order an election "to determine whether such territory shall be an incorporated town," and upon the return of the vote, if favorable to incorporation, to "make an order declaring that said town has been incorporated," and after setting out the provisions of the statute the court said: "The statute conferred power and authority upon the board of county commissioners to hear and determine the application of the appellants, and whether the requirements of the act, under which the application was made, had been fully complied with. The board had acquired jurisdiction. It was their duty to proceed with the consideration of the cause, and if the evidence was sufficient to satisfy them that the requirements of the law had been complied with, to make the proper order, provided for in section 5. The appellants were entitled to the order that the meeting and vote provided for in the statute might be had; and if in favor of the proposition, they were also entitled to the order provided for in section 9; after which, the territory would be an incorporated town, by the name adopted."

It was in interpretation and reaffirmance of this construction of the statute that it was said in the Grusenmeyer case that "the board has no discretion to grant or refuse the application, if the preliminary steps have been taken by the petitioners," that "the decision of the board, in such a case, is judicial, and not merely administrative or legislative;" and hence that there was a right of appeal.

"Such a case," however, is not the one before us, which arose under a radically different statute, whereby it is left to the discretion of the board, according to its own opinion, to grant or refuse the proposed annexation. Such discretion is of the essence of a legislative power. In the proceeding under the act of 1852, for the incorporation of towns, all discretion is left to the voters of the district which it is proposed to incorporate, while the powers given to the boards of commissioners are to hear proofs, determine facts, declare their conclusion, and make the proper order. Such powers
37 are essentially judicial, and from decisions made in the exercise of them, though incidental to a legislative end or proceeding, it was competent for the legislature to allow an appeal. That much the cases, which we have been comparing, mean, but they do not mean that appeals may be prosecuted from decisions upon matters of discretion, whether legislative or judicial, unless, it may be, in cases of gross abuse of judicial discretion. On the contrary, by the Grusenmeyer case, and by many other decisions in Indiana and elsewhere, the right of appeal from discretionary orders is denied. Hannah *v.* Board, 29 Ind. 170; Moffat *v.* State, 40 Ind. 220; City of Ft. Wayne *v.* Cody, 43 Ind. 200; Alexander *v.* Gravel Road Co., 44 Ind. 430; Catterlin *v.* City of Frankfort, 87 Ind. 45; Hunt *v.* State, 93 Ind. 311; Waller *v.* Wood, 101 Ind. 139; Platter *v.* Board, 103 Ind. 360, 374; Farley *v.* Board, 126 Ind. 468; Bunnell *v.* Board, 124 Ind. 1; The State *v.* Board, 131 Ind. 90;

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"Such a case," however, is not the one before us, which arose under a radically different statute, whereby it is left to the discretion of the board, according to its own opinion, to grant or refuse the proposed annexation. Such discretion is of the essence of a legislative power. In the proceeding under the act of 1852, for the incorporation of towns, all discretion is left to the voters of the district which it is proposed to incorporate, while the powers given to the boards of commissioners are to hear proofs, determine facts, declare their conclusion, and make the proper order. Such powers
37 are essentially judicial, and from decisions made in the exercise of them, though incidental to a legislative end or proceeding, it was competent for the legislature to allow an appeal. That much the cases, which we have been comparing, mean, but they do not mean that appeals may be prosecuted from decisions upon matters of discretion, whether legislative or judicial, unless, it may be, in cases of gross abuse of judicial discretion. On the contrary, by the Grusenmeyer case, and by many other decisions in Indiana and elsewhere, the right of appeal from discretionary orders is denied. Hannah *v.* Board, 29 Ind. 170; Moffat *v.* State, 40 Ind. 220; City of Ft. Wayne *v.* Cody, 43 Ind. 200; Alexander *v.* Gravel Road Co., 44 Ind. 430; Catterlin *v.* City of Frankfort, 87 Ind. 45; Hunt *v.* State, 93 Ind. 311; Waller *v.* Wood, 101 Ind. 139; Platter *v.* Board, 103 Ind. 360, 374; Farley *v.* Board, 126 Ind. 468; Bunnell *v.* Board, 124 Ind. 1; The State *v.* Board, 131 Ind. 90;

Motz *v.* City of Detroit, 18 Mich. 495; Owen *v.* Mayor of Albany, 15 Wend. 374; Commonwealth *v.* Woods, 44 Pa. St. 113; Foster *v.* Neilson, 2 Peters 253; Jones *v.* United States, 137 U. S. 202; *In re* Cooper, 143 U. S. 472.

By the act of May 31, 1879, a right of appeal to the circuit court "in proceedings before the boards of county commissioners for the annexation of territory to cities and towns against the will of the owner" was expressly given both to the petitioner and to the owner of any portion of the territory proposed to be annexed; but manifestly it was not intended thereby to take away or modify the discretion with which the act of 1867, section 3660, *supra*, clothes the board, nor to give an appeal from any decision of the board in so far as in the particular instance it was discretionary. But in so far as the board, in any such case, determines questions of fact, which are essential either to the jurisdiction of the board in the proceeding or to the right of annexation, as for instance, the fact and sufficiency of notice, contiguity and ownership of lands, or whether the lands had been platted, its action is of a judicial character and may properly be made subject to review on appeal. That is to say, if the board should order an annexation of territory which was not contiguous, or of contiguous territory without proper notice of the proceeding having been published, an aggrieved owner of land might appeal; or, on the other hand, if upon proper petition and notice the board should order the annexation of only a part of the land sought to be annexed, or should deny the petition *in toto*, putting its decision expressly and solely upon the ground that the territory was not contiguous, or that the names of the true owners of the land were not given, or that the notice was insufficient, or that the lands had been platted by the owner before the proceedings were com-
38 menced, the appeal doubtless might be prosecuted by the petitioner; but in respect to the reasons for annexation, in so far at least as they should be designed and be of a nature only to affect the opinion of the board in respect to the propriety or policy of the proposed annexation, the statute cannot reasonably be said to have been intended to give an appeal, and if so intended it was to that extent ineffectual, as an attempt to give the courts a legislative power. See Commissioners of Drainage District *v.* Griffin, 134 Ill. 330, 341. In disposing of any such appeal the circuit court, it would seem clear, must confine itself to questions of a judicial character, and according to the circumstances enter a final order or send the case back to the board of commissioners, but in no case may order annexation unless the record shows that in the opinion of the board, if the proceedings were regular, the prayer of the petition ought to be granted.

But at this point we are confronted with the decision of the supreme court of Indiana, affirming the judgment of the Porter circuit court, whereby the annexation was ordered, which we are asked to treat as null and void. In the original opinion, which was delivered prior to the hearing before us, the question of the jurisdiction of the courts over the subject-matter was not mentioned, 40 N. E. 267, but in the opinion upon a petition for a rehearing, 42 N. E. —,

the court says: "One of the positions taken by counsel in support of their petition for a rehearing of this case is that the circuit court had no jurisdiction of the appeal from the board of county commissioners, for the reason that the annexation of territory to a city is a legislative, and not a judicial function, and, as such, in case of unplatted lands, the board of county commissioners is given sole and final jurisdiction in the premises. The proposition so advanced was not urged in the original argument, nor on the trial of the cause, and is now brought to our attention for the first time; but, as it is a question that affects the jurisdiction of the trial court, and also of this court, it is one that will be entertained at any time. It may be conceded that annexation of territory to a city is a legislative function. This function is exercised by the common council when it resolves to annex certain described lands to the city, and to present a petition therefor to the county board. It must be admitted, however, as we think, that the after proceedings had upon the petition are of a judicial nature. The petition must give the reasons why, in the opinion of the council, the annexation should take place. The sufficiency of such reasons, and whether they in fact exist, calls for the decision of the tribunal appointed to hear the petition. Notice of the presentation of the petition is also provided for, and adverse parties are thus brought in. Whether the proper preliminary steps have been taken, whether the reasons given in the petition are true and
39 are sufficient, seem to be questions calling for a judicial examination and decision. In a similar case (Grusenmeyer *v.* City of Logansport, 76 Ind. 549) it was said by Woods, J., speaking for this court, that 'the decision of the board in such a case is judicial, and not merely administrative or legislative.' But if the board, in considering and deciding upon the petition, acts in a judicial capacity, certainly the legislature may, as it has done in this case, provide for an appeal to the courts, to determine whether the city council and the county board have complied with the statutory requirements in the action taken. It is the law itself, as has been said, that fixes the conditions of annexation; and the office of the board and of the court is to determine whether the conditions so prescribed by the law have been complied with. The legislature has expressly provided for such judicial determination by the board and for an appeal therefrom to the courts, and this court has frequently recognized the right to such appeal. Section 4224, Rev. St. 1894 (section 3242 Rev. St. 1881); Catterlin *v.* City of Frankfort, 87 Ind. 45; Chandler *v.* City of Kokomo, 137 Ind. 295, 36 N. E. 847; Wilcox *v.* City of Tipton (at this term), 41 N. E. —; see, also, Manufacturing Co. *v.* Emery (at this term), 41 N. E. 814. See, also, City of Wahoo *v.* Dickinson, 23 Neb. 426, 36 N. W. 813."

That the Grusenmeyer case is not similar but radically different has already been explained, and while the other cases referred to recognize the right of appeal in proceedings for annexation they do not countenance appeals in respect to matters of discretion. On the contrary, in Catterlin *v.* Frankfort the disputed questions were of a judicial character, and in the course of the opinion it is said that the statute not having prescribed what reasons for the pro-

posed annexation shall be set forth in the petition, "their sufficiency is necessarily left to the sound discretion of the authority passing upon the petition"—that is to say, to the board of commissioners.

This expression of the Catterlin case is quoted and reaffirmed in the latter cases cited. In Chandler *v.* Kokomo, after quoting it, the court adds: "If, as indicated, the sufficiency of the reasons is a question within the sound discretion of the authority to which they are addressed, we could not review the exercise of that discretion unless, possibly, we should find that it had been palpably abused;" and to the same point in Manufacturing Co. *v.* Emery it is said: "If we could review the exercise of discretion as to the sufficiency of the reasons stated for annexation when it had been palpably abused—a question we do not decide—we would be compelled to adjudge that there was no such abuse in this case."

It is evident that in these utterances it was assumed that the discretion referred to was a judicial discretion, and if that were so there might doubtless be a review in cases of palpable abuse, but once it is conceded to be a legislative discretion, its exercise by the power which possesses it can be reconsidered or revoked, as we suppose only by the same or a higher legislative power. The cases cited, except that from Nebraska, decide nothing to the contrary.

It being conceded that the annexation of territory to a city is a legislative function, the proposition that under the statute "this function is exercised by the common council, when it resolves to annex certain described lands to the city and to present a petition therefor to the county board," is, we think, untenable. Legislative power over a subject, though delegated to a subordinate agency, must in the nature of things be dominating, and, if it be regularly exercised, the result must be as conclusive as if accomplished by direct legislative enactment. If it be subject to any other power it is not legislative.

In cases of the annexation of unplatted lands against the will of the owner, the common council does not "resolve to annex." It has power, and can lawfully "resolve," simply to petition for the annexation of territory of defined limits, and only in respect to the limits of the territory has it a discretion which is final or conclusive. A board of commissioners in Indiana cannot order the annexation of less or more or different territory than that described in the petition; The City of Peru *v.* Bearss, 55 Ind. 576; but the final power to determine whether the annexation asked shall be ordered is given to the county board and is made wholly discretionary. The vital distinction seems to have been overlooked, that this statute does not in all particulars "fix the conditions of annexation," and it is not the office of the board simply to determine "whether the conditions so prescribed by the law have been complied with." The proceedings may be in all respects regular, and the board may find that the reasons for annexation set forth in the petition are true as stated, and yet may disregard them, and either refuse or grant annexation upon considerations not mentioned in the petition. Without a petition nothing can be done, but once a petition has been

presented the board acquires control of the subject-matter and upon proper notice may order the annexation, "if after inspection of the map and of the proceedings had in the case such board is of opinion that the prayer of the petition should be granted." That is to say, the board is given unqualified discretion in respect to final action upon a subject which is confessedly legislative. It is, therefore, necessarily a legislative discretion, over which, consistently with the constitutional distribution of powers, the courts could not be given and cannot assume control.

41 Platted lands contiguous to a city may be annexed simply by resolution of the common council, and unplatted lands with the consent of the owner may be so annexed. For such cases it may be true in a sense that the legislative function and discretion are bestowed on the common council, or on the council and owner of the land together, though it may be more accurate to say, in respect to that class of cases, as the court below said more generally, that there is no delegation of legislative power,—the platting of the land, or the consent of the owner, and the annexing resolution of the common council being merely the antecedent facts upon which the statute *ex proprio vigore* effects the annexation.

It is immaterial here, except for the purposes of comparison or contrast, which of these views is the correct one. Let it be conceded that in such a case the legislative function is exercised by the common council when it resolves to annex. Such an act is of a legislative aspect because it is discretionary and conclusive in respect to a legislative subject.

It was in accord with this view that the court in Chandler *v.* The City of Kokomo, *supra*, declared that "the only feature in which the jurisdiction of the common council and that of the board of commissioners were distinguished was in the one fact as to whether the lands to be annexed were platted or not," and then added: "This fact was clearly a jurisdictional fact, and it was, as such, not only necessary to be alleged, but, also, to be proven." That is to say, if the jurisdiction of one is legislative, so is that of the other, the common council being empowered to annex platted lands, or unplatted lands with the owner's consent, and the board being authorized to act only in respect to unplatted lands.

In the case of The City of Delphi *v.* Startzman, 104 Ind., 343, the court says: "Our decisions have uniformly declared that in such a case as this (that is, where the territory is not platted), the city must petition the board of county commissioners and secure an order from that body. * * * This case does not belong to the class over which the common council has jurisdiction; on the contrary it belongs to a class over which the board of commissioners has exclusive, original jurisdiction." In the same opinion is found the following statement, which treats the subject as political or legislative: "The question is not simply one of relief from taxation, but the question is as to the right to compulsorily change the property of the citizens from the territorial limits of one political corporation into those of another and different corporation. It is, in fact, a

question as to the right to supplant one local government by another."

In Stilz *v.* Indianapolis, *supra*, it was explicitly held that the statute, which we are considering, "should be closely construed, because it is a delegation of legislative power." But if
42 thereby the boards have legislative power, it must consist in the discretion given them to grant or refuse a petition for annexation. No other power is given which can be called legislative, unless the dictionaries and adjudications alike are to be disregarded.

The hearing upon this appeal had been had before the decision upon the petition for a rehearing in the State court was rendered, and before we had knowledge of it we had in consultation agreed upon the opposite view. That decision—in which for the first time the court has recognized the right of appeal to the circuit court from a decision of a county board refusing to order an annexation of territory to a city—it is clear, was the result largely of a misapprehension of the Grusemeyer case and in part of the decision below in this case, which itself is due partly to the same misapprehension and partly to the supposed effect of the constitutional inhibition against special legislation—a matter which we do not regard as of controlling significance. Under the circumstances are we required to yield our judgment to the authority of that ruling?

We think it indisputable that the creation of municipal corporations, including the changing of municipal boundaries, like the law of real estate, is a local subject, in respect to which the Federal courts follow the established local rules. "The well-settled rule in this court," said the Supreme Court in Luther *v.* Borden, 7 How., 40, "is, that the courts of the United States adopt and follow the decisions of the State courts in questions which concern merely the constitution and laws of the State." See also Bucher *v.* Cheshire R. R. Co., 125 U. S., 582. The subject was more fully considered in Burgess *v.* Seligman, 107 U. S., 20, where, in respect to the liability of stockholders under a statute of Missouri, the supreme court of that State had passed upon the questions involved in the case, "and (as here) on the very transaction" which the Federal Supreme Court was considering, and the latter court, with an avowed purpose to obviate misapprehension of expressions used in earlier decisions, said:

"We do not consider ourselves bound to follow the decision of the State court in this case. When the transactions in controversy occurred, and when the case was under the consideration of the circuit court, no construction of the statute had been given by the State tribunals contrary to that given by the circuit court. The Federal courts have an independent jurisdiction in the administration of State laws, co-ordinate with, and not subordinate to, that of the State courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exer-

cise of mutual respect and deference. Since the ordinary ad-
43 ministration of the law is carried on by the State courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the State, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of State constitutions and statutes. Such established rules are always regarded by the Federal courts, no less than by the State courts themselves, as authoritative decisions of what the law is. But where the law has not been thus settled, it is the right and duty of the Federal courts to exercise their own judgment; as they also always do in reference to the doctrines of commercial law and general jurisprudence. So when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or where there has been no decision, of the State tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the Federal courts will lean toward an agreement of views with the State courts if the question seemed to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well considered decisions of the State courts. As, however, the very object of giving to the national courts jurisdiction to administer the laws of the States in controversies between citizens of different States was to institute independent tribunals which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication. As this matter has received our special consideration, we have endeavored thus briefly to state our views with distinctness, in order to obviate any misapprehensions that may arise from language and expressions used in previous decisions. The principal cases bearing upon the subject are referred to in the note, but it is not deemed necessary to discuss them in detail.

"In the present case, as already observed, when the transactions in question took place, and when the decision of the circuit court was rendered, not only was there no settled construction of the statute on the point under consideration, but the Missouri cases referred to arose upon the identical transactions which the circuit court was called upon, and which we are now called upon, to con-
sider. It can hardly be contended that the Federal court
44 was to wait for the State courts to decide the merits of the controversy and then simply register their decision; or that the judgment of the circuit court should be reversed merely because the State court has since adopted a different view. If we could see fair and reasonable ground to acquiesce in that view, we should

gladly do so; but in the exercise of that independent judgment which it is our duty to apply to the case, we are forced to a different conclusion. Pease *v.* Peck, 18 How. 595, and Morgan *v.* Curtenius, 20 *id.* 1, in which the opinions of the court were delivered by Justice Grier, are precisely in point."

In Pease *v.* Peck, the court said: "There are, it is true, many *dicta* to be found in our decisions, averring that the courts of the United States are bound to follow the decisions of the State courts on the construction of their own laws. But although this may be a correct yet a rather strong expression of a general rule, it cannot be received as the enunciation of a maxim of universal application. Accordingly, our reports furnish many cases of exceptions to it. In all cases where there is a settled construction of the laws of a State, by its highest judicature, established by admitted precedent, it is the practice of the courts of the United States to receive and adopt it without criticism or further inquiry. But when this court have first decided a question arising under State laws, we do not feel bound to surrender our convictions on account of a contrary subsequent decision of a State court, as in the case of Rowan *v.* Runnels, 5 How. 139. When the decisions of a State court are not consistent, we do not feel bound to follow the last, if it is contrary to our own convictions,—and much more is this the case, where, after a long course of consistent decisions, some new light suddenly springs up, or an excited public opinion has elicited new doctrines, subversive of a former safe precedent. Cases may exist also, when a cause is got up in a State court for the very purpose of anticipating our decision of a question known to be pending in this court. Nor do we feel bound in any case in which a point is first raised in the courts of the United States, and has been decided in a circuit court, to reverse that decision contrary to our own convictions, in order to conform to a State decision made in the meantime. Such decisions have not the character of established precedent declarative of the settled law of a State. Parties who, by the Constitution and laws of the United States, have a right to have their controversies decided in their tribunals, have a right to demand the unbiassed judgment of the court."

The decision of the State court, which we are asked to follow, seems to us to be in plain conflict with the weight and general current of authority on the subject. It is, too, not only not the logical result of the previous decisions of that court, which may be
45 deemed relevant to the question, but, as we think, distinctly inconsistent with them, and, therefore, ought not to be accepted as a declaration of the settled law of the State. Nor can we yield to the view, so enunciated, on the ground that the question is "balanced with doubt." "If we could see fair and reasonable ground to acquiesce in that view we would gladly do so, but in the exercise of that independent judgment, which it is our duty to apply to the case, we are forced to a different conclusion."

We think that upon the facts alleged the circuit court erred in refusing a temporary restraining order and in dismissing the bill. The order of dismissal is, therefore, reversed and the cause remanded

with instruction for further proceedings not inconsistent with this opinion.

46 CAROLINE M. FORSYTH, Appellant, v. CITY OF HAMMOND *et al.* } 264.

Appeal from the circuit court of the United States for the district of Indiana.

This cause came on to be heard on the transcript of record from the circuit court of the United States for the district of Indiana and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court refusing a temporary restraining order in this cause be, and the same is hereby, reversed with costs, and that this cause be, and the same is hereby, remanded to the said circuit court, with directions to take such further proceedings as are not inconsistent with the opinion of this court.

And afterwards, to wit, on the fourteenth day of February, A. D. 1896, came the appellees, by their counsel, and filed their petition for a rehearing in said above-entitled cause.

And on the same day, to wit, the fourteenth day of February, A. D. 1896, came the appellees, by their counsel, and filed in the office of the clerk of the United States circuit court of appeals for the seventh circuit their notice in the above-entitled cause; which said notice was in the following words and figures:

47 In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, A. D. 1895.

CAROLINE M. FORSYTH, Appellant, v. CITY OF HAMMOND and WILLIAM KLEIHEGE, Treasurer, Appellees. } No. 264.

To Thomas J. Merrifield, W. H. H. Miller, John B. Elam, Ferdinand Winter, Lyman Trumbull, P. Trumbull, and Walter Olds, counsel for appellant:

Please take notice that we have this day filed with the clerk of the circuit court of appeals for the said seventh circuit a petition for rehearing, with certificate, and argument on behalf of the appellees in said cause, and that herewith we deliver to and serve upon each of you copies of said petition, certificate, and argument, all in accordance with the rules of said United States circuit court of appeals for said seventh circuit.

Dated February 14th, A. D. 1896.

CHARLES H. ALDRICH,
FRANK F. REED, AND
E. D. CRUMPACKER,
Counsel for Appellees.

We severally acknowledge receipt of a copy of the said petition for rehearing, certificate, and argument thereon this 14th day of February, A. D. 1896.

LYMAN TRUMBULL,
PERRY TRUMBULL,
Counsel for Appellant.

WALTER OLDS.

48 THURSDAY, *March* 5, 1896.

Court met pursuant to adjournment.

Hon. William A. Woods, circuit judge; Hon. James G. Jenkins, circuit judge; Hon. John W. Showalter, circuit judge.

CAROLINE M. FORSYTH, Appellant,
v.
CITY OF HAMMOND *et al.* } 264.

It is ordered by the court that appellant may be, and is hereby, allowed ten days from this date in which to reply to appellees' petition for rehearing.

FRIDAY, *June* 5, 1896.

Court met pursuant to adjournment.

Present: Hon. William A. Woods, circuit judge; Hon. James G. Jenkins, circuit judge; Hon. John W. Showalter, circuit judge.

CAROLINE M. FORSYTH, Appellant,
v.
CITY OF HAMMOND *et al.* } 264.

It is ordered by the court that the petition for rehearing in this cause be, and the same is hereby, overruled; and it is further ordered that mandate be withheld by the clerk of this court until further order of court.

49 United States Circuit Court of Appeals for the Seventh Circuit.

I, Oliver T. Morton, clerk of the United States circuit court of appeals for the seventh circuit, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 49, inclusive, contain a true copy of the transcript of record and proceedings in the United States circuit court of appeals for the seventh circuit in the case of Caroline M. Forsyth, appellant, *vs.* The City of Hammond and William Kleihege, etc., No. 264, October term, 1895, as the same remains upon the files and records of said United States circuit court of appeals for the seventh circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the seventh circuit, at the city of Chicago, this 6th day of August, A. D. 1896.

Seal United States Circuit Court of Appeals, Seventh Circuit.

OLIVER T. MORTON,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

50 UNITED STATES OF AMERICA, *ss*:

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the seventh circuit, Greeting:

Seal of the Supreme Court of the United States.

Being informed that there is now pending before you a suit in which Caroline M. Forsyth is appellant and The City of Hammond and William Kleihege, treasurer, are appellees, which suit was removed into the said circuit court of appeals by virtue of an appeal from the circuit court of the United States for the district of Indiana, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme
51 Court of the United States, do hereby command you that you send without delay to the said Supreme Court as aforesaid the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 20th day of October, in the year of our Lord one thousand eight hundred and ninety-six.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

By virtue of this writ I do hereby certify to the justices of the Supreme Court of the United States a transcript of said record and proceedings, as within I am commanded.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

OLIVER T. MORTON,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

52 [Endorsed:] Supreme Court of the United States. No. 615. October term, 1896. Caroline M. Forsyth *vs.* The City of Hammond & Wm. Kleihege, treasurer. Writ of certiorari.

Endorsed on cover: Case No. 16,394. Supreme Court U. S., October term, 1896. Term No., 615. Caroline M. Forsyth, appellant, *vs.* The City of Hammond *et al.* Writ of certiorari and return thereto. Office Supreme Court U. S. Filed Oct. 28, 1896. James H. McKenney, clerk.

64-706

Office Supreme Court U. S.
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JAMES H. McKENNEY,
CLERK.

164-706

Supreme Court of the United States.

OCTOBER TERM, A. D. 1896.

IN THE MATTER OF THE APPLICATION OF THE CITY OF HAMMOND FOR A WRIT OF CERTIORARI

IN THE CASE OF

615

CAROLINE M. FORSYTH, *Appellant*,

vs.

THE CITY OF HAMMOND AND WILLIAM KLEIHEGE, TREASURER OF THE CITY OF HAMMOND, *Appellees.*

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR WRIT.

CHARLES H. ALDRICH,
FRANK F. REED,
E. D. CRUMPACKER,
Solicitors for Petitioner.

Eastman Bros., Law Printers, 358 Dearborn St., Chicago.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1896.

IN THE MATTER OF THE APPLICATION OF THE CITY OF HAMMOND FOR A WRIT OF CERTIORARI

IN THE CASE OF

CAROLINE M. FORSYTH, *Appellant*,

vs.

THE CITY OF HAMMOND AND WILLIAM KLEIHEGE, TREASURER OF THE CITY OF HAMMOND, *Appellees.*

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR WRIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court:

Your petitioner, the City of Hammond, respectfully shows and gives the court to understand and be informed:

First. That it is a municipal corporation duly organized and existing under the laws of the State of Indiana, and possessed of all the powers conferred upon and vested in cities in said state by the constitution and general laws thereof, relating to the incorporation of cities.

Second. That in June, A. D. 1893, the Common Coun-

cil of said city, pursuant to the powers vested in such council by the statutes of said state, duly resolved and passed a resolution to annex to said city certain territory contiguous to said city, not laid off in lots, and to the annexation of which the owners thereof would not consent, and to that end said Common Council presented to the Board of County Commissioners of the County of Lake, in the State of Indiana, in which said city and territory are situate, a petition setting forth the reasons for said annexation and at the same time an accurate description, by metes and bounds, accompanied with a plat of the land and territory proposed and desired to be annexed to said city, giving thirty days' notice by publication in a newspaper, published in said city, of the intended petition, and duly describing in said notice the territory sought to be annexed; whereupon the said Board of Commissioners did consider said petition and hear testimony relating to said annexation, and decided against the said annexation, in which proceeding several owners of said territory sought to be annexed, including the said Caroline M. Forsyth hereinafter named, appeared; thereupon said City of Hammond, by its city attorney duly authorized thereto, duly and in apt time prayed and perfected an appeal to the Circuit Court of Lake County, Indiana, as by statute allowed, and which appeal was there duly docketed, all of which proceedings and appeal were in conformity to law.

Third. That thereafter the parties owning the land so sought to be annexed, and among others Caroline M. Forsyth, who later, as hereinafter stated, filed her bill in the Circuit Court of the United States for the District of Indiana, appeared in said cause, and such proceedings were had that the venue of said cause pending as aforesaid in the Circuit Court of Lake County, Indiana, was

duly changed and said cause was transferred to the Circuit Court of Porter County, Indiana, where the same was tried and determined, and which trial resulted in a verdict of the jury and in a judgment thereon by the court finding in favor of the said annexation and sustaining the resolution, desire and petition of the said council of the said City of Hammond, Indiana, therefor, and directing the annexation of the said territory, as prayed in said petition. And said Caroline M. Forsyth was a party to all said proceedings in the Circuit Court of Porter County, and was represented at every stage of said proceedings by counsel, and became party to and was concluded by the judgment entered therein.

Fourth. That thereafter the said Caroline M. Forsyth prayed an appeal from said judgment of the Circuit Court of Porter County, directing said annexation, and perfected the same to the Supreme Court of the State of Indiana, whereby the said Caroline M. Forsyth voluntarily submitted said cause to the Supreme Court of the State of Indiana, and after due consideration thereof, and full argument therein, the said judgment and decree of the Porter Circuit Court was by the Supreme Court of Indiana in all things affirmed, and an opinion filed announcing the reasons therefor, a copy whereof is hereto annexed and marked "Exhibit A" and made a part hereof.

Fifth. That thereafter the said Caroline M. Forsyth filed a petition for a rehearing of said cause in the Supreme Court of the State of Indiana, which petition for rehearing was on the 7th day of November, 1895, overruled, with an opinion setting forth the reasons therefor, and a decree entered in all respects affirming and confirming the judgment of the Circuit Court of Porter County directing said annexation, all of which will more fully and at large appear by the opinion and decree of the Supreme

Court of the State of Indiana, a copy of which is filed herewith, marked "Exhibit B," and made a part of this petition, and duly certified copies of which opinions and judgment were duly filed in the office of the clerk of the Circuit Court of Porter County on the 12th day of November, 1895.

Sixth. That after said Supreme Court of Indiana had rendered said opinion and affirmed said judgment, namely, on the 30th day of April, 1895, the said Caroline M. Forsyth, who had been an active party to the said annexation proceedings through all the courts of the State of Indiana, and had been defeated, instituted in her own name in the Circuit Court of the United States for the District of Indiana, she being during all said proceedings for annexation and at the time last named a citizen of the State of Illinois, a certain suit in equity wherein and whereby she sought an injunction against the City of Hammond and William Kleihege, treasurer of said city, from collecting or attempting to collect certain taxes levied by said city subsequent to the annexation of said territory, upon premises owned by her and lying within said annexed territory, on the ground that said annexation and the proceedings therefor were null and void; and wherein and whereby she sought to have said annexation proceedings adjudged and decreed null and void, and to have the said City of Hammond and its officers and agents perpetually enjoined from entering upon or assuming any jurisdiction whatever over the lands of the said Caroline M. Forsyth, being six hundred and fifty (650) acres, a part and parcel of the territory so annexed by the resolutions of the Common Council of the City of Hammond, and proceedings consequent thereon, as determined and affirmed by the Circuit Court and Supreme

Court of Indiana as aforesaid; that said bill was subsequently amended, and afterwards said cause was submitted to the said Circuit Court of the United States upon the amended bill of complaint, application for injunction, briefs and arguments of counsel, and having been duly considered, the said Circuit Court of the United States for the District of Indiana denied the application of the said complainant for injunction therein, and dismissed the bill of the said Caroline M. Forsyth for want of equity, all of which will more fully and at large appear by a certified copy of the record in said Circuit Court of the United States and the United States Circuit Court of Appeals for the Seventh Circuit, filed herewith, marked "Exhibit C" and made a part hereof.

Seventh. That thereafter the said Caroline M. Forsyth prayed an appeal from the said decree of the Circuit Court of the United States for the District of Indiana to the United States Circuit Court of Appeals for the Seventh Circuit, and thereunder such proceedings were had that the decree of said Circuit Court dismissing said bill was by the said United States Circuit Court of Appeals reversed, and the said cause remanded, with instructions for further proceedings not inconsistent with the opinion of the said United States Circuit Court of Appeals, all of which will more fully and at large appear by certified copies of the opinion of said Circuit Court of Appeals and the order thereof annexed thereto and marked "Exhibit C" and made a part hereof.

Eighth. That in and by said opinion the Circuit Court of Appeals held that the annexation of territory to cities is a legislative matter, over which, consistently with the constitutional distribution of powers, the courts of the State of Indiana could not be given and could not assume

control or jurisdiction, and that, therefore, the action of the Porter Circuit Court and of the Supreme Court of the State of Indiana was ineffectual and inoperative to annex land against the will or consent of the owners; and therein and thereby the said Circuit Court of Appeals also held that it was not bound to follow the said decisions of the Supreme Court of the State of Indiana with reference to such annexation, although between the same parties, and although the said decisions in the said courts had been reached after the fullest hearing and discussion, and in all of which proceedings the said Caroline M. Forsyth had been represented in person and by attorney, all of which will more fully and at large appear by the proceedings found in the record heretofore referred to and marked "Exhibit C."

Ninth. And your petitioner further shows to the court that it had theretofore, relying upon the decision of the Supreme Court of the State of Indiana and the Circuit Court of the United States, levied certain taxes upon the lands of the said Caroline M. Forsyth and the lands of numerous other owners who are concluded by the judgment of the Supreme Court of the State of Indiana, as being resident citizens of said State, and unable to appeal to the jurisdiction of the courts of the United States; and that thereby the land so sought to be annexed as aforesaid is under the law of the State of Indiana held and to be deemed annexed as to all the owners except Caroline M. Forsyth, the taxes upon whose lands alone will exceed the sum of $2,000, exclusive of costs, and by reason of this diversity of decision between the Supreme Court of the State of Indiana and the Circuit Court of Appeals of the United States upon a matter which your petitioner is informed and believes is peculiarly a subject of state con-

trol and jurisdiction, your petitioner is embarrassed in the administration of its affairs, and is unable to collect its taxes and exercise police control over the territory, that other owners who have no right to appeal to the jurisdiction of the Circuit Court of the United States, relying upon such decision, refuse to pay their said taxes so levied as aforesaid, and assert that their said lands are not subject to the control or jurisdiction of said City of Hammond; that owing to this embarrassment and uncertainty, your petitioner, by Mr. Fred R. Mott, its Mayor, addressed to the Honorable Claude Matthews, Governor of the State of Indiana, a letter, copy of which is filed herewith and made a part hereof, marked "Exhibit D," and received in answer thereto a letter under date of July 24, 1896, a copy of which is filed herewith and made a part hereof, and marked "Exhibit E."

And your petitioner shows, as pointed out in such correspondence, that there is danger of a conflict between the jurisdiction of the State of Indiana and the jurisdiction of the courts of the United States, if said cause shall be docketed in the Circuit Court of the United States, and a decree entered therein in accordance with the instructions of the Circuit Court of Appeals, or to avoid such conflict your petitioner must abandon jurisdiction of a large part of the territory so annexed, notwithstanding the decision of the Supreme Court of the State of Indiana that said annexation proceedings are valid and effectual in all respects.

And your petitioner is informed and believes that inasmuch as the Circuit Court of Appeals passed upon the question of the effect of the final judgment of the Supreme Court of the State of Indiana, and denied to such judgment due faith and credit, and so fully passed upon every question that can be litigated in said cause that nothing

remains to said Circuit Court but to enjoin your petitioner as prayed in the bill, thus making it a mere formal matter to enter said decree in said Circuit Court, a case of peculiar gravity and general importance is presented, and such an one that in order to secure uniformity of decision would justify and require this court at this time and without the entry of further orders in the said Circuit Court of the United States to issue its writ of certiorari to review the decree of the Circuit Court of Appeals, Seventh Circuit, and prevent the extraordinary inconveniences and embarrassments in the conduct of said cause, and in the affairs of said city, and a possible conflict between state and federal authority which would arise should a mandate be sent down and the cause docketed and proceedings had therein, as directed by said Circuit Court of Appeals.

Tenth. Your petitioner further shows to the court that the result and effect of said decision of said Circuit Court of Appeals is to render nugatory a decision of the exact questions between the same parties by the highest court of the State of Indiana, thereby in effect making the courts of the United States courts of review as to this case, although no federal or constitutional question or other question giving the courts of the United States jurisdiction is involved therein, and that under and by virtue of said decision, if it shall stand unreversed and this court shall refuse to take jurisdiction of said cause by certiorari or otherwise, the said Caroline M. Forsyth will have been enabled and will succeed in her efforts to render nugatory the action of the Common Council of the City of Hammond, and of the highest courts of the State of Indiana, upon a matter which is wholly, as your petitioner submits, a subject of state control and jurisdiction, and which only affects property and rights within the said State of

Indiana, and requires the construction of the constitution and laws of that state alone. And your petitioner is advised and believes that a party ought not thus to be permitted to experiment with the courts of a state, and having been defeated therein to submit the same matters to the circuit or other courts of the United States. And your petitioner files herewith and makes a part of this petition a full, true and correct copy of the record as it was made in the Circuit Court of the United States for the District of Indiana, together with the transcript of proceedings as the same stands and remains in the United States Circuit Court of Appeals, Seventh Circuit, which copy of proceedings and record is marked "Exhibit C" as aforesaid.

Wherefore your petitioner prays that this Honorable Court will take cognizance of the matters herein set forth and referred to and will require by writ of certiorari the said cause and record thereof to be certified to it by the said United States Court of Appeals for the Seventh District for its review and determination, pursuant to the provisions of the statute in such cases made and provided, and that this court will thereupon make such further order and decree as justice may require.

CHARLES H. ALDRICH,
FRANK F. REED,
E. D. CRUMPACKER,
Solicitors for Petitioner.

STATE OF INDIANA, }
LAKE COUNTY. } ss.

I, Fred R. Mott, on oath say that I am the duly elected Mayor of the City of Hammond, Indiana, and I have read the above and foregoing petition to the Chief Justice and the Associate Justices of the Supreme Court of the United States for a writ of certiorari in the case of Caroline M. Forsyth, appellant, *vs.* The City of Hammond and William Kleihege, Treasurer of the City of Hammond, appellees, asking that the United States Circuit Court of Appeals for the Seventh Circuit may be directed and required to certify the proceedings in said entitled cause to said Supreme Court of the United States, and that the averments therein made are true of my own knowledge, except as to such matters as are stated upon information and belief, and as to such matters I believe them to be true.

FRED R. MOTT.

Subscribed and sworn to before me this }
8th day of August, A. D. 1896. }

PETER CRUMPACKER,

[SEAL.] *Notary Public.*

EXHIBIT A.

Be it remembered that on November 12th, 1895, the following certified copy of opinion of the Supreme Court of the State of Indiana was filed in the office of the clerk of the Porter Circuit Court, and is in the words and figures following, to wit:

THE STATE OF INDIANA.

IN THE SUPREME COURT, NOVEMBER TERM, 1894.

On the 11th day of April, 1895, being the 118th judicial day of said November Term, 1894.

Hon. JAMES MCCABE, Chief Justice.
Honorable Timothy E. Howard,
Honorable Leonard J. Hackney,
Honorable James H. Jordan,
Honorable Leander J. Monks, Judges.

17275.

In the case of

Oliver O. Forsyth *et al.* vs. City of Hammond. } Appeal from the Porter Circuit Court.

Came the parties, by their attorneys, and the court being sufficiently advised in the premises, gave the following opinion and judgment, pronounced by Howard, J.:

PETITION FOR REHEARING OVERRULED.

This was a proceeding before the Board of Commissioners of Lake County to annex certain unplatted territory to the City of Hammond. The board decided against the petition for annexation, and the city appealed to the

Circuit Court of Lake County, from which a change of venue was taken to Porter County, where a special judge was appointed to try the cause. The case was heard by the Hon. W. B. Biddle, Special Judge, and a jury, and the trial resulted in a verdict and judgment in favor of the city and her petition for annexation. The appellee contends that this appeal should be dismissed for the reason that all the persons against whom the judgment was rendered have not been made party appellants. To this contention appellants answer that all such defendants not made appellants, save one, did, within one year after the judgment was rendered, file in this court their written declination to join in the appeal; and that, by proof also filed, it is further shown that said defendant not made a party appellant and not joining in the written refusal to appeal was also, within the year after judgment, notified of this appeal; asking also that said defendant be now made a party appellant.

In this condition of the record, we are of opinion that, while the appeal has been brought with some irregularity of procedure, yet the spirit of the statute regarding the taking of appeals, and also the requirements of our rules and decisions in relation to the same matter, have been practically observed.

The purpose of the statute (section 647, R. S., 1894; section 635, R. S., 1881) was to provide that a part of those against whom a joint judgment was rendered might appeal without compelling the remaining judgment defendants to appeal, and yet give all an opportunity to join in the appeal, so that but one appeal might be taken in one case. Notice is consequently provided to be given to those not joining in the appeal.

If, however, such parties come voluntarily before this court and decline to join in the appeal, it would seem that

as to them all is accomplished that was intended by the statute.

As to the party served with notice of the appeal, we think the conclusion must be the same, for it is shown that he might have joined in the appeal had he so chosen.

So far as the interests of the appellee are concerned, the year allowed for an appeal having passed, there can be no appeal but this one; consequently the decision of this court, when made, will leave the appellee's rights fully and finally determined.

The appellee, therefore, has no interest personal to herself in asking for the dismissal of the appeal.

It thus appears that no one, on either side, who was a party to the judgment has suffered the loss of any right or interest to which he was entitled; and hence no reason remains for the dismissal of the appeal.

The case of *Gregory* v. *Smith* decided at last term and other cases cited by counsel are not in conflict with this conclusion. There all the parties were not before the court—here they are before the court, or have refused to come.

The reason for the rule there insisted upon does not exist in this case, and hence the rule itself does not apply.

The appellants' first contention is that the complaint or petition is insufficient in that it does not show that the owners of the property sought to be annexed to the city had not given their consent to such annexation previous to the bringing of the proceedings before the commissioners.

This objection is brought here for the first time; there was no demurrer or motion to make more specific urged to the complaint in the trial court.

The statute providing for the annexation of unplatted

lands to a city by proceedings before the County Board (Section 3659, R. S., 1894; Section 3196, R. S., 1881) does not require that it shall be stated in the petition that the owners will not consent to annexation. The want of such consent is implied in the very nature of the proceedings; if there were consent, such a proceeding would be quite unnecessary, for the city might then annex the land by a simple resolution, as provided in the same section of the statute.

In the case of *Huff* v. *City*, 108 Ind., 14, although the question was not directly before the court, the opinion was expressed that it is not essential that the petition should contain a statement that the land owners had not consented to annexation. Virtually a like conclusion as to what should be stated in the petition was reached in the recent case of *Chandler* v. *The City of Kokomo*, 137 Ind., ——. Nor, as we think, are the cases cited by counsel for appellants in conflict with this conclusion.

In truth, there are but two methods provided for annexation of lands to cities, one being with the consent of the owners and one without such consent. If the land is platted and the plat is recorded by the owner, the law implies a consent and agreement on his part that the land may be taken into the city. If the land is not platted, or the plat not recorded, the owner may file his written consent with the City Council, agreeing that the land may be annexed.

But in either of these cases the city is also a party to the transaction, and may accept, or refuse to accept, the land as a part of the corporate territory.

But in case the property owner does not consent to annexation—that is, does not make and put on record a plat of his land, or does not file with the city his written agreement that the land may be annexed, while, at the

same time, the city desires such annexation—then the law provides the method by which the controversy may be tried and settled; and the Board of County Commissioners is set up as the tribunal before which, subject to appeal, the dispute between the parties may be determined.

If, however, the property owner had consented to annexation there would be no dispute, no controversy, and hence no action before the County Board.

The law will not presume so vain a thing as that it might be supposed that, though there was consent on the part of the property owners, and though, consequently, the city might have annexed the land by a simple resolution, yet the corporation proceeded to ask the County Board by an adverse proceeding to do for her what, without delay and without opposition, she might do for herself. The very existence of the controversy, therefore, shows not only desire for annexation on the part of the city, but also want of consent thereto on the part of the property owner.

It is next contended that, because certain parts of the territory to be annexed are platted, therefore the commissioners had no jurisdiction to act on the petition. In order that any land, platted or unplatted, should be annexed to a city, it is necessary that the land to be annexed should be contiguous to the city limits—that is, that it should actually touch the existing territory of the city. In an action before the board for annexation this contiguous territory must be unplatted, or, at least, if platted, the plat must as yet be unrecorded. However, should there be, within the limits of the territory to be annexed, certain tracts, called "platted lots," not contiguous to the city limits, and hence not recorded, certainly neither the statute, nor any good reason, would render such circumstance a cause for defeating annexation

by the County Board. The mere fact of platting, taken by itself, is rather a circumstance looking to annexation. It is an attempt to impress upon the territory an urban character; and is, in so far, an expression of consent to annexation. It would need only in addition, as we have seen, that the lots should be contiguous to the city, and that the plat should be recorded, to enable the city to make the annexation without the action of the board. In other words, the reason in favor of annexing such attempted plats of lots are greater than those in favor of annexing unplatted lands themselves.

But are such subdivisions of land as are here referred to legal plats, or plats such as are contemplated in the statutes? We do not think so. A plat of a town or city, or a plat of land adjoining a town or city, may be acknowledged and recorded, in the same manner as a deed (Sections 4411 and 4413, R. S., 1894; Sections 3374 and 3376, R. S., 1881). It is such "lots laid off and platted adjoining such city" that are contemplated in annexation proceedings, and referred to in Sections 3658, 3659, R. S., 1894. (Sections 3195, 3196, R. S., 1881.) There is no provision for placing any other plats on record: and the recording of any other lots or plats of lots would be a nullity. *Taylor* v. *City*, 47 Ind., 274.

The fact, therefore, that certain parts of the territory proposed to be annexed to the appellee city in this proceeding are said to be platted lots, not contiguous to the city, can have no bearing on the result. Such lots are included in the unplatted lands, and can be annexed to the city only as a part of such unplatted lands. Indeed, we may go further: even if the whole tract sought to be annexed were platted, but the plat not recorded, the Common Council would have no authority to annex the

land without the consent of the owners; and the County Board alone could take jurisdiction.

It may be observed, in addition, that the petition for annexation in this case, and also the published notice, describe the territory to be annexed by metes and bounds only, and no mention is made of lots; but a description of lands by metes and bounds is a description of the lands as unplatted. The evidence also shows that the lands were in fact unplatted. It is only on the map filed that we notice on a part of the territory, not contiguous to the city, the outlines of platted lands; but there is no evidence of any attempt at placing such plats on record. These tracts are entitled on the map as subdivisions of parts of certain named sections of land, according to the United States surveys. The principal of these divisions is styled: "Roby & Shedd's Addition to Chicago in Indiana." It is hardly necessary to say that there can not be a legal addition to Chicago in Indiana, and that none of these subdivisions are platted lots as contemplated in our statutes. *Taylor* v. *City*, *supra*.

The whole territory to be annexed, then, is clearly to be regarded as unplatted land. The attempts at platting parts of the territory not contiguous to the city, as shown on the maps filed for inspection by the County Commissioners, could be considered only for the purpose of enabling the board to discover the probable fitness or unfitness of the lands for city uses and purposes.

The case of *Chandler* v. *City*, *supra*, cited by appellants in this connection, had reference to lands contiguous to the city, and not to attempted plats not contiguous, and hence is not here in point.

Contiguous recorded plats may be annexed directly by the city; all other lands are to be regarded as unplatted,

and will be treated accordingly in annexation proceedings.

In the *City* v. *La Rose*, 99 Ind., 117, in considering Section 3660, R. S., 1894 (Section 3197, R. S., 1881), this court said:

> "Provision is made for the annexation to the city of contiguous territory whether platted into lots or otherwise, without the consent of the owners thereof, upon petition of the Common Council to the Board of Commissioners of the county."

In commenting on this decision, counsel say that the clause "whether platted into lots or otherwise" is wholly misleading and contend that it is not warranted by the statute; that the statute provides that only unplatted land may be annexed by action of the County Board.

We are of opinion, however, that the learned judge who spoke for the court in that case intended by the words "platted into lots" to speak of an unrecorded plat of lots. The Common Council, without the consent of the owners, has no authority to annex contiguous unrecorded platted lots, but only those the plats of which are placed on record; and if there should be plats made of lands contiguous to a city, but the plats were kept off the record, it would be only by petition to the commissioners that the city could procure the annexation of such lots. In other words, for the purposes of annexation such lots must, as we have already said, be treated as unplatted lands. And if this is true of a contiguous unrecorded plat, as is the force of what Judge Howk said in the *City* v. *La Rose*, *supra*, still more must it be true of non-contiguous plats, which, as we have seen, not only are not recorded, but for whose record the statute makes no provision.

They must be treated as a part of the unplatted con-

tiguous territory, and hence fall solely within the jurisdiction of the County Board.

It is next contended that the third instruction given by the court to the jury is erroneous. The material part of the instruction complained of is as follows:

> "It is required that the proceedings shall conform strictly to the statutory requirements, and the petition and other documentary evidence have been introduced to prove the regularity of the proceedings; but as no question is raised before you of any want of compliance with the statutory requirements, or that of the contiguity of the territory sought to be annexed, you may find that the proceedings were regular, and that the territory is contiguous to the corporate limits of the City of Hammond."

As the record does show that all the proceedings taken by the city were in conformity with the statute, and that this fact was in no way questioned, and as both parties, and all the evidence, documentary and oral, including the plats filed, showed that the territory sought to be annexed was contiguous to the City of Hammond, there could be no error on the part of the court in assuming the existence of such undisputed facts. *Carver* v. *Carver*, 97 Ind., 497; *Board* v. *Leeg*, 110 Ind., 479. But it is not the contiguity of the territory to be annexed that is disputed by counsel, but whether a part of that territory lying next to the City of Hammond had not already been annexed to the City of East Chicago before the petition for annexation had been presented by the City of Hammond to the County Board. This is not a question as to whether the territory sought to be annexed was contiguous to the City of Hammond, or whether the proceedings for that purpose were regular, but rather whether the annexation could take place for another reason, namely: that the part next to Hammond had been already annexed to East

Chicago. However the latter question might be determined, it would not affect the correctness of the instruction, which related only to the regularity of the proceeding and to the contiguity of the land sought to be annexed. These last questions being undisputed, the instruction was correct.

As to whether a part of the territory sought to be annexed to Hammond had already been annexed to East Chicago, and could not therefore be annexed to Hammond, which is the real question here made, the facts presented, and which were all shown by documentary evidence, were as follows: After the Common Council of the City of Hammond had resolved to present their petition for annexation to the Board of County Commissioners, and after they had given the statutory notice of their intention to present such petition, describing in the notice the lands sought to be annexed, but before the petition was presented to the board, the City of East Chicago, on the written consent of the owners, annexed by resolution to that city a strip of land eighty rods wide on that part of the lands next to Hammond, which the latter city sought to annex.

The effect of this annexation to East Chicago, if valid, would be to defeat the Hammond petition; for if the strip was annexed to East Chicago, it could not also be annexed to Hammond. And as the strip covered all the land in the territory sought to be annexed which was contiguous to the city limits of Hammond, there would be nothing left to annex to that city, for the contiguity of the remaining territory sought to be annexed would be cut off by the East Chicago strip.

The evidence as to the East Chicago annexation proceedings is all documentary and it is without conflict.

The legal sufficiency of this evidence was therefore a

question of law for the court; and if such evidence shows that the action before the East Chicago Common Council was ineffectual for the annexation of the strip in question, the court might so inform the city, and the instruction would not be erroneous for that reason. *The American Ins. Co.* v. *Butler*, 70 Ind., 1. The strip of land proposed to be annexed by East Chicago was unplatted. It was therefore necessary, as we have already seen, that a written consent should be filed for its annexation by the owners of the land. Such a written contract was filed by the Calumet Canal & Improvement Company, one of the appellants and owner of the greater part of the land so annexed to East Chicago, including the whole of the eighty-rod strip contiguous to Hammond. If this strip reached the limits of East Chicago, so that its east end should be contiguous to the limits of that city, there would be no doubt that the written consent of the Improvement Company and the resolution of the Common Council of East Chicago would have effected the desired annexation.

But prior to this time the Improvement Company had, by deeds in fee simple, conveyed to the Chicago & Calumet Terminal Railway Company strips of land which, taken together, entirely cut off the eighty-rod strip from the corporate limits of East Chicago. The railway company did not file any written consent to the annexation of its strips of land to East Chicago. It follows, therefore, that the owners of all the land sought to be annexed to East Chicago not having filed their written consent to its annexation, the Common Council never acquired jurisdiction, and such annexation has not taken place.

The proceedings before the Common Council being a nullity, they may be attacked even collaterally, except, perhaps, in case of estoppel, of which there is no ques-

tion here. *City* v. *McAvoy*, 86 Ind., 587; *Strosser* v. *City*, 100 Ind., 443; *City* v. *Startzman*, 104 Ind., 343; *City* v. *Patterson*, 112 Ind., 344.

While all presumptions will be indulged in favor of the regularity of proceedings before an inferior tribunal when once jurisdiction is shown, yet if it appears that facts essential to jurisdiction are wholly wanting, the presumptions in favor of the action of the tribunal must cease. (*Board* v. *Markle*, 46 Ind., 96; *Wilkinson* v. *Moore*, 79 Ind., 397; *Smith* v. *Clausmeier*, 136 Ind., 105; *Clayborn* v. *Thompkins*, decided at this term.)

Some other questions are discussed by counsel, but we think that in what we have said we have passed upon all questions affecting the merits of the case.

Finding no available error, the judgment is affirmed.

EXHIBIT B.

And afterwards, to wit, on the 7th day of November, 1895, the court, being advised in the premises, overruled the petition for rehearing heretofore filed herein by appellants, with an opinion pronounced by Howard, C. J., as follows:

One of the positions taken by counsel in support of their petition for a rehearing of this case is that the Circuit Court had no jurisdiction of the appeal from the Board of County Commissioners, for the reason that the annexation of territory to a city is a legislative and not a judicial function, and as such, in case of unplatted land, the Board of County Commissioners is given sole and final jurisdiction in the premises. The proposition so advanced was not urged in the original argument, nor on the trial of the cause, and is now brought to our attention

for the first time; but as it is a question that affects the jurisdiction of the trial court and also of this court, it is one that will be entertained at any time. It may be conceded that annexation of territory to a city is a legislative function. This function is exercised by the Common Council when it resolves to annex certain described lands to the city and to present a petition therefor to the County Board.

It must be admitted, however, as we think, that the after proceedings had upon the petition are of a judicial nature.

The petition must give the reason why, in the opinion of the council, the annexation should take place. The sufficiency of such reasons, and whether they in fact exist, calls for the decision of the tribunal appointed to hear the petition. Notice of the presentation of the petition is also provided for, and adverse parties are thus brought in.

Whether the proper preliminary steps have been taken, whether the reasons given in the petition are true and are sufficient, seem to be questions calling for a judicial examination and decision.

In a similar case, *Grusenmeyer* v. *The City of Logansport*, 76 Ind., 549, it was said by Woods, J., speaking for this court, that "the decision of the board in such a case is judicial, and not merely administrative or legislative." But if the board, in considering and deciding upon the petition, acts in a judicial capacity, certainly the legislature may, as it has done in this case, provide for an appeal to the courts to determine whether the City Council and the County Board have complied with the statutory requirements in the action taken.

It is the law itself, as has been said, that fixes the conditions of annexation; and the office of the board and of

the court is to determine whether the conditions so prescribed by the law have been complied with. The legislature has expressly provided for such judicial determination by the board and for an appeal therefrom to the courts; and this court has frequently recognized the right to such appeal. (Section 4224, R. S., 1894; Section 3243, R. S., 1881; *Catterlin* v. *The City of Frankfort*, 87 Ind., 45; *Chandler* v. *The City of Kokomo*, 137 Ind., 295; *Wilcox* v. *City of Tipton*, at this term; see, also, *Windfall, etc., Co.* v. *Emery*, at this term; see, also, *The City of Wahoo* v. *Dickinson*, 23 Neb., 426.)

In *Forsyth* v. *The City of Hammond*, 68 Fed. Rep., 774, Baker, J., in passing upon an application made to the United States Circuit Court for the District of Indiana by one of the appellants in the case at bar to enjoin the appellee from collecting taxes upon the lands annexed in this proceeding, speaking of the question now under consideration, said:

> "The power to hear and determine whether the conditions prescribed by law for the creation, enlargement or contraction of a municipal body exist is judicial in its nature, and may be appropriately conferred upon the courts. The creation, enlargement or contraction of a municipal body is not the act of the court, but is the act and result of the law. The court simply determines whether the conditions are present which authorize the creation of a municipal body, or the enlargement or contraction of its limits; and, when these conditions are judicially ascertained, the law, *ex proprio vigore*, creates the municipal body or enlarges or contracts its boundaries."

Counsel next repeat the contention that the action of the Common Council of East Chicago, in attempting to annex to that city certain of the lands here in controversy without first having secured the assent of the owners of

that part thereof adjacent to the city, cannot be attacked collaterally in this case. We cited in the original opinion numerous authorities to the proposition that the jurisdiction of an inferior tribunal, as a Common Council, may be attacked collaterally, and evidence offered to show that the tribunal did not have jurisdiction of the subject-matter or of the parties.

We have attentively read the acute analysis made of those authorities by counsel, and are still satisfied that the authorities so cited do establish the truth of the proposition stated.

We are inclined to think that counsel have not carefully distinguished between facts as to the jurisdiction of a body, and facts as to the proceedings and acts of that body after jurisdiction is shown. If there is jurisdiction, then the decision that follows is conclusive, except on direct attack. But jurisdiction itself may always be enquired into; and it is only after jurisdiction is established, both of the subject-matter and of the person, that the decision of the tribunal will be invulnerable to collateral attack. As said by this court in *Board* v. *Markle*, cited in the original opinion:

> "The facts which it is said must be shown to exist before the matter can be within the jurisdiction of an inferior court, and which can be enquired into collaterally, are such as in the absence of which the court cannot rightfully hear and determine any question touching the matter in controversy. Hence a recital in the record of such facts may be shown to be false."

See also *State* v. *Hudson*, 37 Ind., 198. As bearing upon the question, see further *Rape* v. *Heaton*, 9 Wis., 328 (76 Am. D., 269); *Thompson* v. *Whiteman*, 18 Wall., 457; *Withers* v. *Patterson*, 27 Tex., 491 (86 Am.

D., 643); *Scott* v. *McNeal*, 154 U. S., 34; Work's Courts and their Jurisdiction, sections 20, 23, 25, 26.

In the case at bar it is not doubted that the owners of the lands adjacent to the City of East Chicago, and which it was attempted to annex to the city, had never assented to such annexation, but that the only petition for annexation presented to the Common Council was by owners of lands not adjacent to the city; yet the claim is made that the question of the right of the council to annex such adjacent lands is foreclosed by the record. The City Council assumed that the petitioners for annexation were the owners of the lands adjacent to the city; and it is said that this assumption is conclusive, although, in fact, the owners of the adjacent lands did not assent to such annexation. If that contention were good why could not any person go before a City Council, claim falsely to be the owner of adjacent lands, and petition for their annexation to the city; and if the record of the Common Council should show that upon such a petition the lands were annexed, how could the decision be collaterally called in question? The law, however, gives the council jurisdiction to annex adjacent lands only on the written assent of the owners. It is clear that the Common Council had no jurisdiction of the subject-matter.

In cases cited in the original opinion we think it is shown that this court has more than once decided practically the same question here raised, namely, that attempts at annexation of lands to cities made by Common Councils not having jurisdiction are void, and may be attacked collaterally as well as directly. *The City of Indianapolis* v. *McAvoy*, 86 Ind., 587; *The City of Delphi* v. *Startzman*, 104 Ind., 343; *The City of Indianapolis* v. *Patterson*, 112 Ind., 344.

Counsel devote much argument and research to show

that where the jurisdiction of an inferior tribunal depends upon a fact, which such tribunal is required to ascertain and settle by its decision, such decision, in general, is conclusive.

It needed but a statement of that proposition to establish its truth. But it does not follow that such tribunal by claiming jurisdiction can establish it.

If the law fixes what is necessary to acquire jurisdiction, the tribunal cannot take jurisdiction not so authorized by law.

The law requires notice to parties who are to be subjected to the decisions of the tribunal. Jurisdiction, therefore, cannot be taken without such notice. But as the tribunal must itself decide whether the notice is sufficient, its decision on such sufficiency is conclusive.

So when a petition is to be filed, such petition is necessary to give jurisdiction; and the tribunal, by finding that a petition was filed, when in fact it was not, could not take jurisdiction. But as the tribunal is the only body to pass upon the sufficiency of the petition, whether it is in proper form, has the requisite number of signers, and whether the persons signing have the proper qualifications, etc., its decision on such questions is final.

Stoddard v. *Johnson*, 75 Ind., 20, one of the leading cases on this subject, and relied upon by counsel, is in harmony with this holding. That case decides that the presentation of a petition for the improvement of a highway gave the County Commissioners jurisdiction over the subject-matter of the petition, and that whether the petition were in all respects sufficient was a jurisdictional question, which the board had a right to decide for itself.

The court, however, is careful to say that it is not to be understood as holding that "any petition, however defective or irrelevant, will be deemed sufficient to invoke the

jurisdiction of the commissioners to decide upon its sufficiency, and to impart validity to that decision as against collateral attack."

The correct rule is stated in the same case:

> "That once the jurisdiction of an inferior tribunal is established over the subject-matter, and the parties to a proceeding which may be had before it, the same presumptions are indulged in favor of the regularity of its action as prevails in favor of the action of the courts of general powers."

Had the Common Council in the case before us acquired jurisdiction over the lands to be annexed and lying adjacent to the city, and had it also acquired jurisdiction over the owners of such lands, then the subsequent proceedings, however defective, would not be void. But not having acquired jurisdiction over the lands or over its owners, the annexation proceedings were a nullity.

Whether the right of way of the Chicago & Calumet Terminal Railway Company was a fee simple or an easement is not material here.

If the strips of land belonging to that company, by whatever name the title may be called, are not within the corporate limits of the City of East Chicago, it is very certain that the land of the petitioner company, and which is separated by those strips from the city limits, is not adjacent to the city. But it cannot rightfully be claimed that these strips are within the limits of the City of East Chicago. They were never annexed, either on petition of the owners or by act of the County Board. The city could not levy taxes or street and sewer assessments upon these strips of land, could not make streets or alleys across them, or in fact exercise any jurisdiction whatever over them. The strips are outside the limits of the city, and completely separate the lands of the Improvement Company from the city limits.

How, then, could the city annex those non-adjacent lands of the Improvement Company? The statute expressly provides that the lands to be annexed to a city shall be adjacent. Had the city jurisdiction of the subject-matter? Could the city, by declaring the lands of the Improvement Company to be adjacent, make them adjacent? If the Common Council could annex lands separated from the corporate limits by a right of way 100 feet across, why might it not annex lands a mile distant from the city? The conclusion is irresistible that the city had no jurisdiction of the subject-matter; the lands of the petitioner company were not adjacent to the city, and could not therefore be annexed.

The petition for a rehearing is overruled.

It is therefore considered by the court that the judgment of the court below in the above-entitled cause be in all things affirmed at the cost of the appellants, all of which is ordered to be certified to said court.

And it is further considered by the court that the appellee recover of the appellants the sum of $51.35 for its costs and charges in this behalf expended.

THE STATE OF INDIANA, }
SUPREME COURT. }

I, Alexander Hess, Clerk of the Supreme Court of the State of Indiana, certify the above and foregoing to be a true and complete copy of the opinion and judgment of said court in the above-entitled cause.

In witness whereof, I hereto set my hand and affix the seal of said court, at the City of Indianapolis, this 9th day of November, 1895.

ALEX. HESS,

[SEAL.] *C. S. C.*

STATE OF INDIANA, } ss.
COUNTY OF PORTER. }

I, Edmund L. Wilson, Clerk of the Circuit Court within and for the County of Porter and State of Indiana, do hereby certify that the above and foregoing is a full, true and complete copy of the opinion of the Supreme Court of Indiana in the case of Oliver O. Forsyth *et al. v.* City of Hammond, as filed in the office of the said clerk of said Porter Circuit Court, on the 12th day of November, 1895, as the same appear of record and on file in my office.

In witness whereof, I hereunto set my hand and affix the seal of said Porter Circuit Court, at my office in the City of Valparaiso, this 31st day of July, A. D. 1896.

E. L. WILSON,
Clerk Porter Circuit Court.
By M. J. DRAPIER,
Deputy.

[SEAL.]

EXHIBIT C.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS.

FOR THE SEVENTH CIRCUIT.

October Term, A. D. 1894.

NO. 264.

CAROLINE M. FORSYTH,
Appellant,

vs.

THE CITY OF HAMMOND AND WILLIAM KLEIHEGE,
TREASURER OF SAID CITY,
Appellees.

MR. THOMAS J. MERRIFIELD,
MR. W. H. H. MILLER,
MR. JOHN B. ELAM,
MR. FERDINAND WINTER,
Counsel for Appellant.

MR. PETER CRUMPACKER,
Counsel for Appellees.

Appeal from the Circuit Court of the United States for the District of Indiana.

IN THE

CIRCUIT COURT OF THE UNITED STATES,

FOR THE DISTRICT OF INDIANA.

No. 9,215.

CAROLINE M. FORSYTH
vs.
CITY OF HAMMOND and WILLIAM KLEIHEGE, Treasurer of said City. } Chancery.

2 Pleas of the Circuit Court of the United States for the District of Indiana, begun and holden at the United States Court House, in the City of Indianapolis, in said District, on the first Tuesday of May, in the year of our Lord one thousand eight hundred and ninety-five, before Honorable John H. Baker, Judge of the District Court of the United States for the District of Indiana, and *ex-officio* Judge of said Circuit Court.

Caroline M. Forsyth
vs.
City of Hammond and William Kleihege, Treasurer of said City. } No. 9215. Chancery.

Be it remembered, that heretofore, to wit: at the November term of said court, on the 30th day of April, 1895, before Honorable John H. Baker, Judge of said court, the following proceedings in the above-entitled cause were had, to wit:

Comes now the complainant by Miller, Winter & Elam,

her solicitors, and files her bill of complaint herein in the words following, to wit:

3 To the Judges of the Circuit Court of the United States for the District of Indiana. Caroline M. Forsyth of the City of Chicago and a citizen of the State of Illinois, brings this her bill against the City of Hammond and William Kleihege, the treasurer of the said city, both of whom are citizens of the State of Indiana.

And thereupon your oratrix complains and says: That she is the owner and seized in fee of the tracts and parcels of lands in the County of Lake and State of Indiana described as follows:

Lots 2 and 3 and part of Lot 1 in Section 1, Township 37, Range 10 west; Lots 1, 2, 3 and 4 in Section 12, same township and range; the N. ½ of Lot 1 in Section 13, same town and range; Lots 1 and 2 in Section 7, same town, range 9; Lots 3 and 4 in same section, town and range; the W. ½ of the N. W. ¼, and the S. E. ¼ of the N. W. ¼ of Sec. 7, town 37, range 9; part of Lot 1 in Sec. 18, same town and range; part of fractional N. W. ¼ S. of the P., Ft. W. & C. Ry. in Section 6, town 37, range 9; W. ½ of the S. W. ¼ of the same section,

4 town and range, containing in all about 725 acres; that by proceeding instituted at the June, 1893, session of the board of commissioners of Lake County, Indiana, and from thence carried by appeal to the Lake Circuit Court, and from thence transferred by change of venue to the Porter Circuit Court of Indiana, the said City of Hammond pretended to annex and now claims to have annexed said lands of your oratrix, together with a large body of other lands, to the territory of the said city, and the said city now claims and pretends to exercise jurisdiction over the same and to have the right to assess said lands and the personal property thereon for taxation, and

to levy and collect taxes on the same, as well to aid in the payment of the past and present indebtedness of the said city as to carry on the future government thereof; that the said city, in pursuance and assertion of the said claim, has by its officials levied taxes for the year 1894 against the said lands and personal property thereon of your oratrix to the amount of $3,500, and that the said

William Kleihege, who is the treasurer of the said
5 city, is in his official capacity proceeding and threatening to collect the same by the sale of the said lands, as well as by levy, distress and sale of the personal property of your oratrix, and will proceed so to collect the same unless restrained therefrom by order of the court.

That the whole of the said land of your oratrix is used solely by your oratrix for pasturage, and hay and other agricultural purposes; that the rental value of the said land does not exceed $1.00 per acre; that no part of said land has ever been mapped off or platted with a view to sale as such, nor does oratrix contemplate doing so; that on all said lands of your oratrix there are but twenty-one dwelling houses, ten of them being in a row together, and near to—about one-fourth of a mile—the town of Whiting, in said County of Lake, containing 2,500 to 3,000 inhabitants, a town of rapid growth and great business activity and prosperity, and that tenants of said ten houses do business and work and labor in said town,

and the rest of said houses on said land are in clus-
6 ters of two and three, which clusters are widely apart;

that the houses on said land are four and one-half miles distant from any police station, fire-engine house or gas-lamp of the City of Hammond; so that, in the nature of things, she cannot receive any service, advantage or benefit whatever from the municipal government of the

said city; that said lands were valued for taxation by said city at the rate of $250 to $500 per acre, and that said taxes amount to about $5 per acre; that said valuation is enormously in excess of the real value of the said lands, and that said taxes are exorbitant, oppressive and extortionate.

Your oratrix further says that at the time said attempted annexation proceedings were instituted the said City of Hammond contained and still contains not more than 6,000 or 7,000 inhabitants, and that it had territory about three miles long, north and south, and about two miles wide east and west, extending on the west to the state line. The most populous portion of the city
7 was and is on the extreme western line, or on the boundary line of the State of Indiana and the State of Illinois, beginning about one-fourth of the way from the northern boundary of the said city and extending thence to the southern boundary thereof. The northern frontier of the said territory consists of sections 24 and 19, or about two square miles of land, neither of which nor any part thereof has ever been laid off into lots or blocks, the one not having a single house or road upon it, and the other having but seven houses and one road at the time such proceedings for annexation was instituted, as aforesaid; that the part of Hammond laid off into lots is much larger than is now or likely to be required for city purposes for many years to come, and that its present boundaries contain nearly 4,000 acres, capable of conveniently containing and accommodating a population of almost a million people; that the said city has a
8 large bonded indebtedness, exceeding, as your oratrix is informed and believes, the sum of $100,000; that she has been unable to ascertain the exact amount of its floating indebtedness, but according to the best infor-

mation she has been able to obtain such indebtedness is not less than $60,000, and that the total taxables of the said city proper amount in all to little more than $4,000,000. That the territory attempted to be annexed consists of about five square miles lying directly north and extending all the way from the northern limits of the City of Hammond to the shore of Lake Michigan. Immediately on the north and overlapping somewhat the limitsof the city are two lakes—Wolf Lake and Lake George—shallow and having shores and margins of a marshy nature. Between these two lakes is a narrow neck of land, low and swampy, extending north and south, the narrowest point of said neck being about 450 feet wide at the northern limits of Hammond and widening to about 2,100 feet at the northern shore of Lake George, being in length about one mile. Along this neck or isthmus is the only direct route from the City of Hammond to the property of value sought to be annexed, the most populous and most valuable portion of which lies in the very northern part of the tract and near the trunk lines of the railroads that skirt the shore of Lake Michigan and near to the City of Chicago; the distance from the business portion of the City of Hammond to this part of the territory is between four and five miles, and the only means of connection between the two is a low, bad and muddy road along and over said narrow isthmus or neck of land. That previous to said attempted annexation one Agnes Roberts had laid out into lots and mapped and platted about twenty acres in the north-east part of the said territory and adjoining the said town of Whiting in said Lake County, solely with reference to said town, and without any reference whatever to said City of Hammond, lying between four and five miles away, and that before the said attempted annexation Edward Roby

9

10 and Edward A. Shedd had laid off and platted two tracts of land, amounting in all to thirty-five acres, in the north-west part of the territory sought to be annexed into lots, which they denominated Roby & Shedd's Addition to Chicago in Indiana; and said lots were so platted with reference to South Chicago and the Roby race track, and had no reference whatever to the City of Hammond, distant therefrom about five miles; that the whole of said territory sought to be annexed, except the parts platted as aforesaid, consists, in part, of said ridges and sloughs, all of which that is not vacant is used for pasturage and agricultural purposes solely; that the same is very sparsely and thinly settled, and that the dwelling houses and buildings thereon, except a very small portion thereof in said north-east corner, are widely separated from one another; that the inhabitants thereof have no need whatever of municipal government, and from the nature of the situation, it is utterly impossible that they could derive any advantage or benefit whatever from

11 being included within the corporate boundaries of the said City of Hammond, and burdened with heavy taxation thereby; that said lands have not been enhanced in value by reason of their proximity to the said City of Hammond, and that if they should eventually be included within the boundaries of the said city, their value would be greatly impaired and diminished; that the sale thereof would be greatly hindered if not rendered impracticable and impossible by reason of the heavy and excessive taxes imposed upon them by said city, and it may be reasonably expected that the lands themselves would eventually be taken and sold to satisfy said taxes. That this attempted extraordinary and unreasonable enlargement of the boundaries of the said city was not needed for roads, streets or alleys, or for the carrying out of any city

improvements, or for any legitimate city purpose whatever; that the same was unnecessary and uncalled for by the wants of the said city or by the wants or wishes of the inhabitants and property owners included within the new territory, whose property would be greatly
12 diminished in value thereby, and that the peace, good order, tranquillity or prosperity neither of the said city nor of the said territory did require that said territory should be brought under the municipal control of the said city. That said attempted enlargement was an abuse and violation of the franchises of the said city, and a contemplated fraud upon the law of the State of Indiana granting to cities the right to annex a reasonable quantity of contiguous lands when said lands are needed for legitimate city purposes, or when the same are so benefited or enhanced in value by their proximity to corporate municipalities that they ought in justice to share the burdens of the government thereof. That said attempt was dictated, above all, by covetousness and greed, and a corrupt desire on the part of the authorities of the said city to subject the land and property of your oratrix in the new territory, and others similarly situated, to the burdens of taxation by said city for the sole benefit
13 of the said city, and to raise means to pay off its heavy indebtedness, and thereby relieve the inhabitants of the original and proper city from a portion of the said indebtedness without rendering any service, advantage or benefit whatever to the new subjects of taxation. This complainant further avers that at the time said annexation proceedings were commenced, and even since the said City of Hammond had a municipal debt amounting to nearly or quite twice the constitutional limit, being in the neighborhood of four (4) per cent., and the purpose of said annexation was, by taking into

the city limits new property at an exaggerated valuation, to so increase the appraised taxables of said city as to lift said city out of said constitutional dilemma without any regard whatever to the question of benefits or advantages to the property so pretended to be annexed; and that if said pretended annexation be allowed to stand, and said tax levy to be enforced, it will be the means of injustice and oppression to your oratrix and others, and her and their property and money will be taken for the sole
14 benefit of another without compensation—without due process of law and in violation as well of the constitution of the State of Indiana as of the 14th article of the amendments to the constitution of the United States.

And your oratrix further says that, at the time of the institution of the said proceedings for the annexation of the said territory a strip of land lying on the south thereof and adjoining the northern boundary of the said City of Hammond, about a quarter of a mile wide and extending from the western boundary of the City of East Chicago, westward to the state line, had been, by and with the consent of the owners thereof, annexed to the said City of East Chicago, and was then wholly under the jurisdiction, control and government of the said last named city, thus separating and entirely interrupting and cutting off the contiguity of the boundaries of the said City of Hammond to the territory thus sought to be annexed.

15 That for this reason, and for the further reason, that parts of the said territory sought to be annexed had been laid off into lots and blocks, mapped and platted, as aforesaid, the said Board of Commissioners had no jurisdiction whatever over said proceeding on the part of the said City of Hammond to annex said territory, and that

said pretended annexation was and is wholly invalid, null and void.

To the end, therefore, that your oratrix may have that relief which she can only obtain in a court of equity, and that the said defendants may answer the premises, but not upon oath or affirmation, the benefit whereof is hereby expressly waived by your oratrix, and that the said defendant, the City of Hammond, may be perpetually enjoined from collecting or attempting to collect said taxes by or through its officers or agents, or in any other manner whatever; that said pretended annexation may be pronounced, adjudged and decreed null and void;
16 that the said City of Hammond and its officers and agents may be perpetually enjoined from entering upon or assuming any jurisdiction whatever over the said lands of your oratrix, and that your Honors may grant such further or other relief as the nature and circumstances of this case may require and to your Honors seem meet.

May your Honors grant unto your oratrix a writ of subpœna, to be directed unto the said City of Hammond and the said William Kleihege, treasurer of the said city, commanding them and each of them to appear before your Honors and make full, true, direct and perfect answer to all and singular the premises, and further to stand to and abide such further order, direction and decree therein as to your Honors may seem meet.

Your oratrix further prays that in the meantime the said defendants and each of them may be restrained by the order and injunction of this court from proceeding or attempting to proceed in any manner whatever to
17 collect or receive said taxes or any part thereof and your oratrix will ever, etc.

THOS. J. MERRIFIELD,
MILLER, WINTER & ELAM,
Solicitors for Complainant.

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

Jacob Forsyth, being duly sworn, says that the matters and things set forth and alleged and the foregoing bill are true in substance and in fact, as he verily believes. Affiant further says that he is the husband and agent of Caroline M. Forsyth, the complainant in the foregoing bill, and that he has personal knowledge of the facts stated in said bill, whereas said Caroline has knowledge of many of said facts from information and belief only. He therefore, at her request, makes this affidavit in her behalf.

JACOB FORSYTH.

Subscribed and sworn to before me, Noble C. Butler, Clerk U. S. District Court, District of Indiana, this 30th day of April, A. D. 1895.

NOBLE C. BUTLER,
Clerk.

18 And now comes the defendants by Peter Crumpacker, Esq., their solicitor, and file their application for a continuance of the complainant's motion for an injunction herein, which application is in the words following, to wit:

Come now the defendants and move the court for a continuance of the hearing of plaintiff's application for a special injunction in the above-entitled cause, for the following reasons: that on Saturday, April 27th, defendants received notice of said application, which is herewith filed and made a part hereof; that at said time their attorney, Peter Crumpacker, was absent at the city of Indianapolis, and did not return until Sunday, the 28th day of April, 1895, that defendants have no knowledge whatever of the character of plaintiff's bill, nor what, if any, preparation

it will require to meet the application for a special injunction. They further say that they have written to the clerk of said court for a copy thereof, whereby they may ascertain the cause of complaint. They further
19 say that the said Crumpacker is city attorney for the City of Hammond, Indiana, and that as such, it is his duty to look after the defense of both of these defendants in said cause, as nearly as they can anticipate the nature of the action; that the Lake Circuit Court is now in session; that said Crumpacker is busily engaged in the said Lake Circuit Court, and has causes set on each day of this week; that it will be impossible for him to attend and contest the said application any day this week for said reasons; that the causes in which he is engaged are jury cases, and that he cannot leave to attend to the said application for an injunction without great damage to his clients whose cases come on for trial this week; that he has one case to be tried before the jury in said Lake Circuit Court on the 30th day of April and the date fixed in said notice for a hearing of said application and has several rules against clients to discharge on said day in said court and it will be impossible for him to attend the hearing of said application on said day without much and irreparable damage to his clients in said cause pending in said Lake Circuit Court; that he can not pro-
cure a continuance in said matters in said Lake Cir-
20 cuit Court.

Defendants further say that they apprehend, but do not know that the said bill is to enjoin the collection by the defendant treasurer of certain taxes taxed against the plaintiff and plaintiff's property in the City of Hammond and they aver that plaintiff's said property is within the City of Hammond and that it was duly annexed thereto by a judgment of the Porter Circuit Court of Indiana ren-

dered some time in the summer of the year 1893, that the said plaintiff Caroline M. Forsyth and others appealed from the said decision of said Porter Circuit Court to the Supreme Court of Indiana; that the said Supreme Court on April 11, 1895, affirmed the decision of said Porter Circuit Court annexing the territory and the land of plaintiff as a part of said City of Hammond. Defendants say that they believe that the plaintiff is not entitled to a restraining order or any special injunction; that they believe if they have an opportunity so to do, and that if the said hearing is continued for a reasonable time they will be able to show to the honorable judge of said court
21 before whom said application will be presented that the plaintiff is not entitled to any relief in equity nor to any restraining order.

They further say that whatever taxes may be charged against plaintiff are past due or delinquent; that there are no immediate proceedings or steps being taken by distraint or levy or any other mode to make immediate collection upon any of plaintiff's property for her taxes; that defendants are willing to let any matter pertaining to the collection of plaintiff's taxes rest for a reasonable time, and for a sufficient time that such application can be heard; that the granting of a restraining order to this plaintiff would cause the defendant, City of Hammond, much trouble and embarrassment; that a large number of other property owners who are alike situated to plaintiff would in the event that a temporary restraining order is granted, refuse to pay their taxes; that thereby the treasurer of said city would be impoverished, and the payment of said city's legitimate outstanding obligations would be delayed; that if a restraining order is granted, it is the belief of defendants that it would induce a large number of

22 other property owners to bring like suits, wherefore defendants ask time until May 11, 1895, in which to answer plaintiff's bill, and which to make a showing therein, and they say that they believe that if said matter is continued until said date they can make such showing as that will result in the refusal of the Honorable Judge of said court to grant any injunction or restraining order whatever. They make the above statements without any knowledge of what the facts are in plaintiff's bill, but as they anticipate and surmise them to be, and not for delay merely, but that justice may be done.

CITY OF HAMMOND,
By Peter Crumpacker, City Attorney.
WM. KLEIHEGE,
By Peter Crumpacker, Attorney.

STATE OF INDIANA, } ss.
LAKE COUNTY. }

Peter Crumpacker, being sworn, on oath says that he is city attorney for the City of Hammond, defendant in the above-entitled cause, and that he is also the attorney for the defendant, William Kleihege, in all matters that pertain to his official business, and that involve him
23 as treasurer where he is not the real party in interest, but is only made a party by virtue of his office; that affiant dictated the aforesaid application for a continuance of said cause; that the same is true in fact so far as he has personal knowledge thereof, and as to the other, he states to be true upon the best information he is able to obtain, and upon his belief.

PETER CRUMPACKER,

Subscribed and sworn to before me this 29th day of April, 1895.

[SEAL.] ERNEST S. SHORTRIDGE, *Notary Public.*

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

Caroline M. Forsyth
vs.
The City of Hammond, William Kleihege, as Treasurer of said City. } In Chancery.

To said defendants:

You and each of you are hereby notified that on Tuesday, the 30th day of April, 1895, at ten A. M. of
24 said day, or as soon thereafter as the same can be heard, the plaintiff will make application to the Hon. John H. Baker, one of the judges of said court, at his chambers in the City of Indianapolis, Indiana, and move for a special injunction in the above-entitled cause; when and where you may appear and resist the same, if you see fit.

THOS. J. MERRIFIELD,
Of Counsel for Complainant.

And afterwards, to wit: at the November term of said court, on the 1st day of May, 1895, before Honorable John H. Baker, Judge of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the complainant, by counsel, and files her amended bill of complaint herein, in the words following, to wit:

25 *To the Judges of the Circuit Court of the United States for the District of Indiana:*

Caroline M. Forsyth, of the City of Chicago, and a citizen of the State of Illinois, brings this her bill against the City of Hammond and William Kleihege, the treasurer

of the said city, both of whom are citizens of the State of Indiana; and thereupon your oratrix complains and says:

That she is the owner and seized in fee of the tracts and parcels of land in the County of Lake and State of Indiana as follows:

Lots 2 and 3 and part of lot 1, in section 1, township 37, range 10 west.

Lots 1, 2, 3 and 4, in section 12, same township and range.

The north $\frac{1}{2}$ of lot 1, in section 13, same town and range.

Lots 1 and 2, in section 7, same town, range 9.

Lots 3 and 4, in same section, town and range.

West $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ and the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 7, town 37, range 9.

Part of lot 1, in section 18, same town and range; part of fractional N. W. $\frac{1}{4}$ S. of the P., Ft. W. & C. Ry., in section 6, town 37, range 9.

W. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of the same section, town and range. Containing in all about 725 acres.

26 That by a proceeding instituted at the June, 1893 session of the Board of Commissioners of Lake County, Indiana, and from thence carried by appeal to the Lake Circuit Court, and from thence transferred by change of venue to the Porter Circuit Court of Indiana, the said City of Hammond pretended to annex, and now claims to have annexed said lands of your oratrix, together with a large body of other lands, to the territory of the said city, and the said city now claims and pretends to exercise jurisdiction over the same, and to have the right to assess said lands and the personal property thereon for taxation, and to levy and collect taxes on the same as well to aid in payment of the past and present indebtedness of the said city as to carry on the future government

thereof. That the said city in pursuance and assertion of its said claim has by its officials levied taxes for the year 1894 against the said lands and personal property thereon of your oratrix to the amount of $3,500, and that the said William Kleihege, who is the treasurer of the said city, is, in his official capacity proceeding and threat-
27 ening to collect the same by the sale of said land as well as by levy, distress and sale of the personal property of your oratrix, and will proceed so to collect the same unless restrained therefrom by order of the court.

That the whole of the said land of your oratrix is used solely by your oratrix for pasturage and hay and other agricultural purposes; that the rental value of the said lands does not exceed $1.00 per acre, and the said lands have no market value, but whatever value said lands have is speculative and prospective, dependent upon the location yet unsecured of manufacturing establishments there, whose market and offices are in Chicago, Illinois, and in no degree helped in the neighborhood of Hammond, but, as matter of fact, the taxation of said lands in the City of Hammond will render said lands unsalable and of very little value; that no part of the said land has ever been mapped off or platted with a view to sale of such, nor does your oratrix contemplate doing so; that on all said lands of your oratrix there are but twenty-one dwelling-houses, ten of them being in a row together, and near to—
28 about one-fourth of a mile—the Town of Whiting, in said County of Lake, containing from 2,500 to 3,000 inhabitants, a town of rapid growth and great business activity and prosperity, and that tenants of said ten houses do business and work and labor in said town, and the rest of said houses on said land are in clusters of two and three, which clusters are widely apart; that the houses

on said lands are four and one-half miles distant from any police station, fire engine house or gas-lamp of the City of Hammond, so that, in the nature of things, she cannot receive any service, advantage or benefit whatever from the municipal government of the said city. That said lands were valued for taxation by said city at the rate of $250 to $500 per acre, and that said taxes amount to about $5 per acre; that said valuation is enormously in excess of the real value of the said lands, and that said taxes are exorbitant, oppressive and extortionate.

Your oratrix further says, that at the time said attempted annexation proceedings were instituted, the said City of Hammond contained, and still contains, not
29 more than 6,000 or 7,000 inhabitants, and that it had territory about three miles long north and south, and about two miles wide east and west, extending on the west to the state line. The most populous portion of the city was and is on the extreme western line, or on the boundary line of the State of Indiana and the State of Illinois, beginning about one-fourth of the way from the northern boundary of the said city, and extending thence to the southern boundary thereof. The northern frontier of the said city, prior to the said alleged annexation, consists of sections 24 and 19, or about two square miles of land, neither of which, nor any part thereof, have ever been laid off into lots or blocks; the one not having a single house or road upon it, and the other having but seven houses and one road at the time such proceedings for annexation were instituted as aforesaid; said vacant lands lying between the settled parts of said city and the said lands of this complainant; that the part of Hammond laid off into lots is much larger than is now or likely to be required for city purposes for many years to come, and that its present boundaries contain nearly 4,000 acres,

30 capable of conveniently containing and accommodating a population of almost a million of people. That the said city has a large bonded indebtedness, exceeding, as your oratrix is informed and believes, the sum of $100,000; that she has been unable to ascertain the exact amount of its floating indebtedness, but, according to the best information she has been able to obtain, such indebtedness is not less than $60,000. and that the total taxable of the city proper amount in all to little more than $400,000. That the territory attempted to be annexed consists of about five square miles of practically vacant lands, lying directly north, and extending all the way from the southern limits of the City of Hammond to the shore of Lake Michigan. Immediately on the north and overlapping somewhat the limit of the city are two lakes—Wolf Lake and Lake George—shallow and having shores of a marshy nature. Between these two lakes is a narrow neck of land, low and swampy, extending north and south, the narrowest point of said neck being about 450 feet wide at the northern limits of Hammond, and widening to about 2,100 feet at the
31 northern shore of Lake George, being in length about one mile. Along this neck or isthmus is the only direct route from the City of Hammond to the property of value sought to be annexed, the most populous and most valuable portion of which lies in the very northern part of the tract and near the trunk lines of the railroads that skirt the shore of Lake Michigan and near to the City of Chicago. The distance from the business portion of the City of Hammond to this part of the territory is between four and five miles, and the only means of connection between the two is a low, bad and muddy road along and over said narrow isthmus or neck of land. That previous to said attempted annexation one, Agnes

Roberts, had laid out into town lots and mapped and platted about twenty acres in the northeast part of the said territory and adjoining the said Town of Whiting in said Lake County, solely with reference to said town and without any reference whatever to said City of Hammond, lying between four and five miles away; and that before the said attempted annexation Edward Roby and Edward A. Shedd had laid off and platted two tracts of land, amounting in all to thirty-five acres, in the northwest
32 part of the territory sought to be annexed into lots, which they denominated Roby & Shedd's Addition to Chicago in Indiana, and said lots were so platted with reference to South Chicago and the Roby race-track, and had no reference whatever to the City of Hammond, distant therefrom about five miles. That the whole of said territory sought to be annexed, except the parts platted as aforesaid, consists in part of sand ridges and sloughs; all of that which is not vacant is used for pasturage and agricultural purposes solely; that the same is very sparsely and thinly settled and inhabited; that the dwelling houses and buildings thereon, except a very small portion thereof in said northeast corner, are widely separated from one another; that the inhabitants thereof have no need whatever of municipal government, and that, from the nature of the situation it is utterly impossible that they should derive any advantage or benefit whatever from being included within the corporate boundaries of the said City of Hammond and burdened with heavy taxation thereby; that said lands have not been enhanced in value by reason of their proximity to the said City of Hammond, and
33 that if they should eventually be included within the boundaries of the said city their value would be greatly impaired and diminished. The lands most remote from Hammond are the most valuable, and their value

increases with the distance from Hammond. That the sale thereof would be greatly hindered, if not rendered impracticable and impossible by reason of the heavy and excessive taxes imposed upon them by said city, and it may be reasonably expected that the lands themselves would eventually be taken and sold to satisfy said taxes. That this attempted extraordinary and unreasonable enlargement of the boundaries of the said city was not needed for roads, streets or alleys or for the carrying out of any city improvements or for any legitimate city purposes whatever; that the same was unnecessary and uncalled by the wants of the said city or by the wants or wishes of the inhabitants and property owners included within the new territory whose property would be greatly diminished in value thereby, and that the peace, good
34 order, tranquillity or prosperity either of the said city or of the said territory did not require that said territory should be brought under the municipal control of the said city. That said attempted enlargement was an abuse and violation of the franchise of the said city and a contemplated fraud upon the law of the State of Indiana granting to the cities the right to annex a reasonable quantity of contiguous land when said lands are needed for legitimate city purposes or when the same are so benefitted or enhanced in value by their proximity to corporate municipalities that they ought in justice to share the burdens of the government thereof. That said attempt was dictated above all by covetousness and greed, and a corrupt desire on the part of the authorities of the said city to subject the land and property of your oratrix in the new territory, as well as that of others similarly situated to the burdens of taxation by said city for the sole benefit of the said city, and to raise means to pay off its heavy indebtedness, and thereby relieve the inhabitants

of the original and proper city from a portion of the
35 said indebtedness without rendering any service, advantage or benefit whatever to the new subjects of taxation.

The complainant further says that at the time said annexation proceedings were commenced, and ever since, the said City of Hammond had a municipal debt amounting to nearly or quite twice the constitutional limit, being in the neighborhood of four per cent., and the purpose of said annexation was by taking into the city limits new property at an exaggerated valuation, to so increase the appraised taxables of said city as to lift said city out of said constitutional dilemma, without any regard whatever to the question of benefits or advantages to the property so pretended to be annexed.

The complainant avers that said City of Hammond is not only thus attempting to levy and collect taxes on said lands for municipal purposes, but is about to commingle said moneys so collected with the other funds of said city, and to use the same in payment of its said debts so accumulated in excess of the constitutional limit, and in the payment of ordinary municipal expenses, such as lighting, street making, police and fire protection and
36 water, but no part of the city funds is or is to be expended in such municipal benefits on this complainant's property, but the same is as completely without lights, water, streets, police and fire protection as before said pretended annexation proceedings were commenced.

The complainant avers that in the proceeding heretofore recited for the annexation of said premises to the City of Hammond, the decision and judgment of the Board of Commissioners of Lake County was against said annexation, and against the said City of Hammond and in favor of this complainant's and others remonstrance

before said board; and thereupon the said City of Hammond undertook to appeal from said decision to the Lake Circuit Court, and did file a transcript of said proceedings in said last-named court, and thereafter a pretended change of venue having been taken from said Lake Circuit Court to the Porter Circuit Court, a pretended trial by jury was had in said last-named court upon said question of annexation, resulting in a verdict and judgment in favor of said annexation and against said remon-
37 strance, including this complainant for costs.

But this complainant avers that she is advised and therefore charges the fact and the law to be that said appeal from said Board of Commissioners to Lake Circuit Court was without warrant of law, unauthorized and the proceedings therein had void, for that the annexation of territory to a city is a matter of legislative and not of judicial cognizance, and it was not competent for the legislature to commit the determination of the question to the courts and juries, and she further alleges that the pretended change of venue from the Lake to the Porter Circuit Court was without warrant of law, and conferred upon said last-named court no jurisdiction in the premises.

And your oratrix further says that at the time of the institution of the said proceedings for the annexation of the said territory, a strip of land lying on the south thereof and joining the northern boundary of the said City of Hammond, about a quarter of a mile wide and extending from the western boundary of the City of
38 East Chicago westward to the State line, had been by and with the consent of the owners thereof annexed to the said City of East Chicago, and was then wholly under the jurisdiction, control and government of the last-named city, thus separating and entirely cutting

off the contiguity of the boundaries of the said City of Hammond to the territory thus sought to be annexed.

That for this reason and for the further reason that parts of the said territory sought to be annexed had been laid off into lots and blocks, mapped and platted as aforesaid, the said Board of Commissioners had no jurisdiction whatever over said proceeding on the part of the said City of Hammond to annex said territory, and that the said pretended annexation was, and is, wholly invalid, null and void.

To the end, therefore, that your oratrix may have that relief which she can only obtain in a court of equity, and that the said defendants may answer the premises, but not upon oath or affirmation, the benefit whereof is ex-
39 pressly hereby waived by your oratrix, and that the said defendant, the City of Hammond, may be perpetually enjoined from collecting or attempting to collect said taxes by or through its officers or agents, or in any other manner whatever; that said pretended annexation may be pronounced, adjudged and decreed null and void; that the said City of Hammond and its officers and agents may be perpetually enjoined from entering upon or assuming any jurisdiction whatever over the said lands of your oratrix, and that your Honors may grant such further or other relief as the nature and circumstances of this case may require and to your Honors seem meet.

May your Honors grant unto your oratrix a writ of subpœna to be directed unto the said City of Hammond and the said William Kleihege, treasurer of the said city, commanding them and each of them to appear before your Honors and make full, true, direct and perfect answers to all and singular the premises, and further to stand to and abide such further order, direction and decree therein as to your Honors may seem meet.

40 Your oratrix further prays that, in the meantime the said defendants and each of them may be restrained by the order and injunction of this court from proceeding or attempting to proceed in any manner whatever to collect or receive said taxes, or any part thereof, and your oratrix will ever, etc.

THOS. J. MERRIFIELD,
MILLER, WINTER & ELAM,
Solicitors for Complainant.

STATE OF INDIANA, }
COUNTY OF MARION. } ss.

Jacob Forsyth, being duly sworn, says that the matters and things set forth and alleged in the foregoing bill are true in substance and in fact as he verily believes. Affiant further says that he is the husband and agent of Caroline M. Forsyth, the complainant in the foregoing bill, and that he has personal knowledge of the facts stated in said bill, whereas said Caroline has knowledge of many of said facts from information and belief only. He, therefore, makes this affidavit in her behalf.

JACOB FORSYTH.

Subscribed and sworn to before me, H. W. Phillips,
41 a Notary Public, in and for said district, county and state, this 1st day of May, A. D. 1895.

H. W. PHILLIPS,
[SEAL.] *Notary Public.*

And afterwards, to wit: at the May term of said
42 court, on the 3rd day of July, 1895, before Honorable John H. Baker, judge of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties, the complainant by Thomas J.

Merrifield and Miller, Winter & Elam, her solicitors, and the defendants by Peter Crumpacker, their solicitor, and this cause having been submitted to the court upon the bill of complaint, amended bill of complaint, application for injunction, briefs and argument of counsel, and the court having duly considered the same and being sufficiently advised in the premises, denies the application of the complainant for an injunction herein, and finds that the equity of this cause is with the defendants.

It is therefore ordered, adjudged and decreed by the court that the application of the complainant for an injunction herein be and the same is hereby denied, and that the bill of complaint and amended bill of complaint herein be, and the same are hereby dismissed for want of equity.

And it is further ordered, adjudged and decreed that the complainant do pay to the defendants their costs herein expended, taxed at $——.

And afterwards, to wit: at the May term of said court, on the 13th day of July, 1895, before Honorable John H. Baker, judge of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the complainant by counsel and files her petition for appeal, assignment of errors and bond herein, in the words following, to wit:

42–1 OPINION OF THE COURT.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

Caroline M. Forsyth
vs.
City of Hammond *et al.* } No. 9,215 In Equity.

BAKER, District Judge.

This is a suit to enjoin the collection of taxes levied

for city purposes by the defendant city on the lands of the complainant. The question for decision is the sufficiency of the bill to entitle the complainant to the equitable relief for which she prays. The sufficiency of the bill depends upon the answers to be given to two questions:

First. Were the proceedings and judgment of the Circuit Court of Porter County, Indiana, which adjudged the annexation of certain lands, including the complainant's, to the City of Hammond, illegal and void, or were they valid?

It is contended that the judgment annexing the lands of the complainant and others to the City of Ham-
42–2 mond is void because the creation and enlargement of municipal bodies are purely political questions to be decided by the legislature, and not judicial, to be determined by the courts, and hence that the legislature cannot confer upon the courts power or authority to adjudge or decree the annexation of territory to a municipal body. It is not denied that the legislature has attempted to confer such power upon the courts, but the contention is that the question of the enlargement of the limits of a municipal body is purely a political question, and that under the constitution of the state no power except judicial can be conferred, upon a number of authorities in support of their contentions, which we here cite: Dillon on Municipal Corporations, Sec. 9; 1 Beach on Public Corporations, Sec. 80; *Stone* v. *Charlestown*, 114 Mass., 220; *People* v. *Bennett*, 29 Mich., 451; *Galesburg* v. *Hawkinson*, 75 Ill., 152; *People* v. *Town of Nevada*, 6 Cal., 143.

It must be conceded that these authorities, to which others might be added, do hold that the legislature
42–3 of a state cannot confer power upon the courts to

change the boundaries of such municipal bodies as cities or towns by annexing territory to, or disconnecting it from them, because such acts are in their essential nature legislative and political, and not judicial; that the same power cannot be either legislative or judicial, as the legislature may be disposed to retain it or surrender it to the judiciary; and that as it is a legislative power, the courts cannot be invested with it. It is said that whether a city, town or village shall be incorporated, and if incorporated, whether enlarged or contracted in its boundaries, presents no question of law or fact for judicial determination. It is, so it is said, purely a question of policy to be determined by the legislative department.

I should perhaps feel constrained to yield to the force of the reasoning of these authorities if the constitution of this state conferred power on the legislature to create such municipal bodies, or to enlarge or contract their boundaries by the enactment of special laws applicable to each particular municipal body. Such power, however, is denied to the legislature by the constitution of the state; the constitution requires the organization of cities and towns, and the enlargement or contraction of their boundaries to be provided for and regulated by general laws. These laws, in the nature of things, must be prospective, and must specify the conditions on the happenings of which such creation, enlargement or contraction may be made, and must provide some tribunal to determine the existence of these conditions. The power to hear and determine whether the conditions prescribed by law for the creation, enlargement or contraction of a municipal body exist, is judicial in its nature, and may be appropriately conferred upon the courts. The creation, enlargement or contraction of a municipal body is not the act of the court, but is the act and result

42–4

of the law. The court simply determines whether
42–5 the conditions are present which authorize the creation of a municipal body or the enlargement or contraction of its limits, and when these conditions are judicially ascertained the law, *ex proprio vigore* creates the municipal body or enlarges or contracts its boundaries. The constitution of the state compels the legislature to confide this power to some tribunal, and to none could it more appropriately have been confided than to the courts. It is a legitimate function of courts to ascertain and determine the existence or non-existence of a given state of facts. The legislature is required, as we have seen, to provide by general laws for the creation of municipal bodies and for the enlargement and contraction of their boundaries; and no limitation has been placed upon the power of the legislature to confer upon any tribunal it may select the authority to determine when the conditions are present which shall create, enlarge or contract municipal bodies. The power of the legislature in this regard being unlimited, it may exercise its own discretion in confiding to any tribunal it pleases the
42–6 power to determine the existence of the conditions which shall give effect to the general law touching the enlargement of municipal bodies.

It is thoroughly well settled that many legislative enactments are valid and constitutional which became operative upon persons and property within defined territorial limits on the happening of some future contingency. Among such enactments are laws providing for aid in the construction of railroads and other public improvements whose operation is made dependent on the petition or vote of the electors or tax-payers of a specified locality. So also local option laws making the sale of intoxicating liquors within certain territorial limits lawful or unlawful

are made dependent on the vote or petition of a certain number of electors in such localities. These enactments only become operative on the happening of conditions which must be ascertained and determined by some tribunal in the manner appointed by law. It is not
42–7 perceived why the ascertainment and determination of the condition upon which the law shall become operative within given territorial limits may not be committed to the courts. In my judgment the legislature possessed the constitutional power to confer jurisdiction on the courts to hear and determine whether or not the requisite conditions exist to justify the annexation of territory to a municipal body.

The decisions of the Supreme Court of this state are in harmony with these views. While this precise question has been but seldom referred to, the Supreme Court has in cases too numerous to justify citation, by taking appellate jurisdiction, recognized the power of the courts to hear and determine the questions confided to them by the statute providing for the incorporation of cities and towns. In the case of *Grusenmayer* v. *City of Logansport*, 76 Ind., 549, the court expressly affirmed the jurisdiction of the courts to hear and determine these questions; and
42–8 the court there declared that these questions were judicial in their nature. This case has been cited and approved in many more recent decisions of the court. The question must be regarded as settled in this jurisdiction adversely to the contention of complainant's counsel. Besides, the Supreme Court of the state, in the recent case of *Forsyth* v. *City of Hammond*, 40 N. E. Rep., 267, has decided that the annexation of the lands of the complainant and others to the City of Hammond was lawfully made; and this court possesses neither the disposition nor the power to declare the annexation of the ter-

ritory in question invalid. The decisions of the Supreme Court of the state on questions of local law are binding and conclusive on this court.

Second. It is insisted that it is evident from the facts stated in the bill that the enlargement of the boundaries of the City of Hammond over large tracks of farm and vacant lands did not have its origin in the legitimate needs of the city, but in the desire to impose the burdens
42–9 of taxation upon property beyond the limits of the city *de facto*, as indicated by houses, streets or other urban improvements, and without any ability or intention on the part of the city to make any compensation for the taxes so levied and collected. It is said that this is an abuse of the law and an act of injustice and oppression from which the courts may relieve; that it is violative of the constitutional guaranty which forbids the taking of private property for public use without making just compensation therefor; and that independently of this constitutional guaranty there is a fundamental principle of right and justice in the nature and spirit of all constitutional governments which the legislature may not disregard without overpassing its rightful authority.

By the constitution the whole legislative power of the state is vested in the general assembly. When, therefore, an act of the general assembly is passed which violates no provision of the state or federal constitution the
42–10 courts cannot declare it void on the ground that it is wrong, unjust or oppressive, or on the ground that it violates the genius or spirit of our institutions. (*Welling* v. *Merrill*, 52 Ind., 350; *Churchman* v. *Martin*, 54 Ind., 380; *City of Logansport* v. *Seybold*, 59 Ind., 225.) Courts would find themselves upon a shoreless sea with neither chart nor compass to direct their course if they should undertake the task of declaring statutes invalid be-

cause of their supposed conflict with the principles of natural justice or because they were supposed to be violative of the spirit of constitutional governments. Other remedies must be invoked and applied for the correction of such evils, if they should arise.

The tax levy sought to be restrained does not conflict with the constitutional provisions invoked. This is settled so far as the constitution of this state is concerned by the case of *City of Logansport* v. *Seybold*, 59 Ind., 225, and so far as the constitution of the United States is concerned by the case of *Kelly* v. *Pittsburg*, 104 U. S., 78. This court cannot say, however great the hardship or unjust the burden, that the tax in question is the taking of property of the complainants without due process of law, or without just compensation.

42–11

It is claimed that the indebtedness of the City of Hammond is in excess of the constitutional limit, and that it is proposed to apply the taxes when collected to the payment of such unlawful indebtedness. But this affords no excuse for the complainant's failure to pay her taxes. If when these taxes are paid the city authorities shall undertake to apply them to the payment of invalid or illegal obligations, it will be time for the complainant to invoke the aid of the court to restrain such misappropriation of the corporate funds.

The injunction will therefore be denied, and the bill dismissed for want of equity at complainant's costs.

42–12 PETITION FOR APPEAL AND ASSIGNMENT OF ERRORS.

The complainant in the above-entitled cause, Caroline M. Forsyth, respectfully prays that she may be allowed an appeal from the decree entered herein by this court on the 2nd day of July, 1895, dismissing her bill for want of equity to the Circuit Court of Appeals for the Seventh Circuit, and she tenders herewith her bond in the penalty of five hundred dollars, with Charles B. Shedd as surety, and she herewith submits the following assignment of errors:

1. The Circuit Court erred in refusing to grant the injunction as prayed in said bill.

2. The Circuit Court erred in holding that the statute of the State of Indiana, authorizing an appeal from the decision of the Board of Commissioners refusing to annex the territory in dispute to the City of Hammond to the Circuit Court, was a valid statute.

3. The Circuit Court erred in holding that the power to annex territory to a municipal corporation under the constitution of Indiana is a judicial and not a legislative power.

42–13 4. The Circuit Court erred in holding that said bill did not state a cause of action in equity.

5. The Circuit Court erred in dismissing said bill for want of equity.

Wherefore she prays that said decree dismissing said bill be reversed.

THOS. J. MERRIFIELD,
MILLER, WINTER & ELAM,
Solicitors for Caroline Forsyth.

Appeal granted and bond approved July 13, 1895.

JOHN H. BAKER,
Judge.

43 UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF INDIANA.

Caroline M. Forsyth
vs.
City of Hammond and William Kleihege, Treasurer.
No. 9215. In Chancery.

Know all men by these presents, that we, Caroline M. Forsyth and Chas. B. Shedd, are held and firmly bound unto the City of Hammond and William Kleihege, treasurer, in the penal sum of five hundred dollars, for the payment of which we bind ourselves, our heirs and our personal representatives.

The condition of the above obligation is as follows:

Whereas the above-named Caroline M. Forsyth has appealed from the final decree entered on the 2nd day of July, 1895, in this suit, dismissing the appeal for want of equity, to the United States Circuit Court of Appeals for the Seventh Circuit.

Now, if the said appellant shall prosecute her said
44 appeal with effect, and pay all costs and damages that may be assessed against her in the premises, then this bond to be void, else in full force.

Witness our hands this 11th day of July, 1895.

CAROLINE M. FORSYTH,
CHARLES B. SHEDD.

Approved July 13, 1895.

JOHN H. BAKER, *Judge.*

45 And thereupon it is ordered by the court that the appeal be allowed as prayed, and that the said appeal bond be, and the same is, hereby approved by the court.

CHANCERY.

UNITED STATES OF AMERICA.

To the City of Hammond, and William Kleihege, Treasurer of said city, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Seventh Circuit, to be holden at Chicago thirty days after the date hereof, pursuant to an appeal which has been allowed by the Circuit Court of the United States for the District of Indiana, from its final decree in a suit wherein Caroline M. Forsyth is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant as in the said appeal, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. JOHN H. BAKER, Judge of the District Court of the United States for the District of Indiana, and *ex-officio* Judge of said [SEAL.] Circuit Court, this 2nd day of August, in the year of our Lord, one thousand eight hundred and ninety-five.

JOHN H. BAKER, *Judge.*

I hereby accept service of the above notice, this 3rd day of August, 1895.

PETER CRUMPACKER,
Atty. for Appellees.

On this 5th day of August, in the year of our Lord one thousand eight hundred and ninety-five, personally appeared Thos. J. Merrifield before me, the subscriber, and makes oath that he delivered a true copy of the within citation to the within-named William Kleihege

and to Peter Crumpacker, the attorney of said appellees, on the 3rd day of August, 1895.

THOS. J. MERRIFIELD.

Sworn to and subscribed the 5th day of August, A. D. 1895.

WILMA M. ROE,
Notary Public.

[SEAL.]

46 UNITED STATES OF AMERICA, DISTRICT OF INDIANA. } ss.

I, Noble C. Butler, Clerk of the Circuit Court of the United States for the District of Indiana, do hereby certify that the above and foregoing is a full, true and complete transcript of the record in the cause of *Caroline M. Forsyth* v. *City of Hammond et al.*, as fully as the same appears of record and remains on file in my office.

Witness my hand and the seal of said court at Indianapolis in said district, this 10th day of August, A. D. 1895.

[NOTARIAL SEAL.] NOBLE C. BUTLER, *Clerk.*

Wednesday, Sept. 25, 1895.

Before Hon. John W. Showalter, Circuit Judge.

Caroline M. Forsyth, *Appellant*,
264 *vs.*
City of Hammond *et al.*

It is ordered by the court that the time allowed by the rules of this court in which appellant may file brief in this cause be, and the same is hereby extended ten days.

Monday, October 7, 1895.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held at

the United States Court Rooms, in the City of Chicago, in said Seventh Circuit, on Monday, the 7th day of October, 1895, of said October Term, in the year of our Lord one thousand eight hundred and ninety-five, and of our Independence the one hundred and twentieth year.

Present: Hon. William A. Woods, Circuit Judge; Hon. James G. Jenkins, Circuit Judge; Hon. John W. Showalter, Circuit Judge.

Caroline M. Forsyth,
Appellant,
264 *vs.*
City of Hammond *et al.*

It is ordered by the court that this cause be, and the same is hereby set down for hearing October 30, 1895.

Wednesday, October 30, 1895.

Court met pursuant to adjournment.

Present: Hon. William A. Woods, Circuit Judge; Hon. James G. Jenkins, Circuit Judge; Hon. John W. Showalter, Circuit Judge.

Caroline M. Forsyth,
Appellant,
264 *vs.*
City of Hammond *et al.*

It is ordered by the court that the appellee be and is hereby allowed fifteen days from this date in which to file brief in this cause.

Caroline M. Forsyth,
Appellant,
264 *vs.*
City of Hammond *et al.*

Now this day came the parties, by their counsel, and this cause now comes on to be heard on the printed record and briefs of counsel, and on oral argument by Mr.

W. H. H. Miller and Mr. Lyman Trumbull, counsel for appellant, and by Mr. Peter Crumpacker, counsel for appellee; and the court having heard the same, takes this matter under advisement.

Saturday, November 16, 1895.

Before Hon. William A. Woods, Circuit Judge.

264 Caroline M. Forsyth, *Appellant*, *vs.* City of Hammond *et al.*

It is ordered by the court that the time allowed appellee in which to file his brief in this cause be and the same is hereby extended three days.

Thursday, January 16, 1896.

Court met pursuant to adjournment.

Present: Hon. William A. Woods, Circuit Judge; Hon. James G. Jenkins, Circuit Judge; Hon. John W. Showalter, Circuit Judge.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 264. October Session, 1895.

Caroline M. Forsyth *vs.* The City of Hammond and William Kleihege, Treasurer. — Appeal from the Circuit Court of the United States for the District of Indiana.

Before WOODS, JENKINS and SHOWALTER, *Circuit Judges*.

The bill in this case was brought by Caroline M. Forsyth, a citizen of Illinois, against the City of Hammond, Indiana, and William Kleihege, treasurer of that city, to enjoin the collection of taxes levied upon lands of the complainant for the use of the city, and, after hearing

and denial of a motion for an injunction *pendente lite*, was dismissed for want of equity. *Forsyth* v. *City of Hammond*, 68 Fed. R., 774.

The substance of the bill is: That the complainant is the owner of the lands described, in Lake County, Indiana, to the number proximately of 650 acres; that by certain proceedings commenced before the Board of Commissioners of that county in June, 1893, and carried by appeal to the Lake Circuit Court and thence by change of venue to the Porter Circuit Court, the City of Hammond pretended to have annexed and now claims jurisdiction over and the right to assess for taxation, and for the year 1894 has levied taxes on the lands and personal property thereon to the amount of $3,500, which the treasurer is proceeding and threatening to collect; that the land is used solely for pasturage and other agricultural purposes, has a rental value not exceeding one dollar per acre, has no market value, but only a prospective and speculative value dependent upon the location yet unsecured of manufacturing establishments there whose market and offices are in Chicago, and is in no degree helped by the neighborhood of Hammond, and by taxation there will be rendered unsalable and of little value: that no part of the land has been platted with a view to sale, and no such step is contemplated; that there are but twenty-one dwelling houses on the land, ten of them being in a row together near Whiting, a town of rapid growth, containing 2,500 or 3,000 inhabitants, at which the tenants of the ten houses do business or work; that the other houses on the land are in wide-apart clusters of two or three; that the houses on the land are four and one-half miles distant from any police station, fire-engine house or gas lamp of Hammond; so that, in the nature of things, the complainant cannot receive any benefit from the government

of that city; that the lands were valued for taxation by the City of Hammond at the rate of $250 to $500 per acre, making the taxes about $5 per acre, which is excessive, oppressive and extortionate; that at the time of the attempted annexation, Hammond contained and still contains not more than 7,000 inhabitants and had territory about three miles long north and south, and two miles wide, extending on the west to the state line, adjoining which line is the most populous portion of the city, beginning about one-fourth of the way from the north line and extending to the southern boundary—the northern frontier of the city consisting of about two square miles of land, no part of which has been laid off into lots or blocks, and upon which there were but seven houses and one road when the attempt was made to annex complainant's lands which lie beyond and northward of the two square miles mentioned; that the part of Hammond laid off in lots is much larger than is now or is likely to be required for city purposes for many years to come; that (upon information) the city has a bonded debt of $100,000, and a floating debt of $60,000, and taxable property in the city proper of little more than $400,000; that the territory attempted to be annexed contains about five square miles of practically vacant lands, extending from the northern limit of Hammond to the shore of Lake Michigan; that immediately on the north and overlapping the limit of the city are two lakes—Wolf Lake and Lake George—shallow and of marshy shores, between which is a narrow neck of low, swampy land about a mile long, over which by a low and muddy road is the only direct route from Hammond to the property of value sought to be annexed, the most populous and most valuable portion of which lies in the northern part of the tract, near the trunk lines of railroad along the shore of Lake Michigan,

and near Chicago, and from four to five miles distant from the business portion of Hammond; that before the attempted annexation, twenty acres in the northeast corner of the land had been laid out in town lots and platted by Agnes Roberts with reference to the adjoining Town of Whiting, and without reference to Hammond, which is between four and five miles away, and two tracts, aggregating thirty-five acres in the northwest part had been laid off and platted by Edward Roby and Edward A. Shedd with reference to South Chicago, and denominated Roby & Shedd's Addition to Chicago in Indiana; that except the parts so platted the lands sought to be annexed consist in part of sand ridges and sloughs, and are used for pasturage and agricultural purposes solely, being sparsely and thinly inhabited, the dwelling houses and buildings thereon, except the small portion in the northeast corner, being widely separated from one another; that the inhabitants have no need of municipal government, and, from the nature of the situation, can possibly derive no benefit from being included within the corporate boundaries and burdened with the taxation of Hammond; that the lands have not been enhanced in value by reason of proximity to Hammond, and would be greatly impaired in value if brought within its limits, the sale thereof being greatly hindered, if not made impossible, by reason of the heavy and excessive taxes imposed; that this attempted extraordinary and unreasonable enlargement of the boundaries of the city was not needed for roads, streets, alleys or for any legitimate purpose, but was an abuse and violation of the franchise of the city, and a contemplated fraud upon the law of the state granting to cities the right to make reasonable annexations; that this attempt was dictated above all by covetousness and greed and a corrupt desire on the part of the

authorities of the city to subject the lands of complainant and others in the new territory to the burdens of taxation for the sole benefit of the city, to raise means to pay off its heavy indebtedness, relieving the inhabitants of the city proper, without rendering any service or benefit to the new subjects of taxation; that the debt of the city was and is about four per cent. of the valuation of its taxable property, or twice the amount limited by the constitution of the state, and the purpose was by annexing new property at an exaggerated value to lift the city out of its constitutional dilemma, without regard to the question of benefits or advantages to the property annexed; that the city is not only thus attempting to levy and collect taxes on said lands for municipal purposes, but is about to commingle the moneys so collected with other funds of the city, and to use the same in payment of its debts in excess of the constitutional limit and in the payment of ordinary municipal expenses, but no part of the city's funds has been or is to be expended for the benefit of complainant's property which is completely without lights, water, police and fire protection, as before the pretended annexation was had.

It is further averred that in the proceedings recited the Board of Commissioners of Lake County refused to order the annexation prayed for, whereupon the City of Hammond undertook to appeal to the Lake Circuit Court whence there was a pretended change of venue to the Porter Circuit Court, which, upon the verdict of a jury, gave judgment in favor of the annexation; that the appeal and the change of venue were, as the complainant is advised, without authority and the proceedings thereon void for that the annexation of territory to a city is a matter of legislative and not of judicial cognizance, which it is not competent for the legislature to commit to the

determination of courts and juries. That when the proceedings for annexation were begun, a strip of land lying between the territory to be added and the northern boundary of Hammond, about a quarter of a mile wide and extending from the western boundary of the City of East Chicago westward to the state line had been, with the consent of the owners thereof, annexed to and was then wholly under the jurisdiction, control and government of the last-mentioned city, thus separating and cutting off all contiguity of the boundaries of Hammond and the territory proposed to be annexed. Prayer, among other things, that the annexation be declared void and that the City of Hammond be enjoined from collecting taxes or otherwise asserting jurisdiction over the complainant's lands.

The proceedings for annexation were had under the following provisions of the act of March 14, 1867, touching the incorporation and powers of cities, the marginal numbers given referring to Burns' Revised Statutes of Indiana, 1894, and to the Revision of 1881, respectively:

> Sec. 3659 (3196) ". . . If any city shall desire to annex contiguous territory not laid off in lots, and to the annexation of which the owner will not consent, the Common Council shall present to the Board of County Commissioners a petition setting forth the reasons for such annexation, and at the same time present to such board an accurate description by metes and bounds, accompanied with a plat of the lands or territory proposed or desired to be annexed to such city. The Common Council shall give thirty days' notice, by publication in some newspaper of the city of the intended petition, describing in such notice the territory sought to be annexed."
>
> Sec. 3660 (3197). "The Board of County Commissioners, upon the reception of such petition, shall consider the same, and shall hear the testimony

offered for or against such annexation, and if after inspection of the map and of the proceedings had in the case such board is of the opinion that the prayer of the petition should be granted, it shall cause an entry to be made in the order-book specifying the territory annexed, with the boundaries of the same, according to the survey, and they shall cause an attested copy of the entry to be filed with the recorder of such county, which shall be duly recorded in his office, and which shall be conclusive evidence of such annexation in all courts of this state."

A right of appeal in such proceedings was given by the act of May 31, 1879, from which we quote the portions pertinent here:

Sec. 4224 (3243). "In proceedings before the Board of County Commissioners for the annexation of territory to cities and towns against the will of the owner, the petitioner and the owner of any portion of the territory proposed to be annexed, may appeal to the Circuit Court by filing within thirty days with the auditor, a bond," etc. . . . Sec. 4226 (3245)." . . . "The appeal shall be tried and determined as an original cause." Sec. 4227 (3246)." . . . "The court may make a final determination of the proceeding and compel its execution or may send its decision to the board with directions how to proceed, and require compliance."

The constitution of Indiana contains the following provisions:

Article 3. "The powers of the government are divided into three separate departments; the legislative, the executive, including the administrative, and the judicial; and no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in this constitution expressly provided."

Article 4, Sec. 23. "In all the cases enumerated in the preceding section, and in all other cases where a general law can be made applicable, all laws shall

be general, and of uniform operation throughout the state."

Article 11, Sec. 13. "Corporations, other than banking, shall not be created by special act, but may be formed under general laws." This provision has been held to apply to municipal corporations. *Wiley* v. *Bluffton*, 111 Ind., 155.

Schedule, clause 4. "All acts of incorporation for municipal purposes shall continue in force under this constitution until such time as the general assembly shall, in its discretion, modify or repeal the same."

Woods, Circuit Judge, after making the foregoing statement, delivered the opinion of the court:

The authorities cited in support of the proposition that the power to establish municipal corporations and to enlarge or contract their boundaries is legislative are numerous and conclusive: Dillon, Mun. Corp. Sec. 9; Beach, Pub. Corp. Vol. 1, Sec. 80; Cooley, Const. Lim. (4th Ed.) 232; *Stone* v. *Charleston*, 114 Mass., 220; *People* v. *Bennett*, 29 Mich., 451; *Galesburg* v. *Hawkinson*, 75 Ill., 152; *People* v. *Town of Nevada*, 6 Cal., 143; *Stilz* v. *Indianapolis*, 55 Ind., 515; *Coffin* v. *State*, 7 Ind., 157; *Sloan* v. *State*, 8 Blckf., 361; *Laramie Co.* v. *Albany Co.*, 92 U. S., 310; *Merryweather* v. *Garrett*, 102 U. S., 472.

And being a legislative power the rule in Indiana as in other states is, that it cannot be conferred upon or exercised by a court whose functions are judicial. *Wright* v. *Defrees*, 8 Ind., 298; *Schoultz* v. *McPheeters*, 79 Ind., 373; *State* v. *Noble*, 118 Ind., 350; *State* v. *Denney*, 118 Ind., 382; *Hovey* v. *State*, 127 Ind., 588; *State* v. *Colson*, 130 Ind., 442; *State* v. *Haworth*, 122 Ind., 462; *Hancock* v. *Yaden*, 121 Ind., 366; *Greenough* v. *Greenough*, 11 Pa. St., 487; *Legal Tender Cases*, 12 Wall., 457.

It is contended, nevertheless, that since the decision in *Grusenmeyer* v. *City of Logansport*, 76 Ind., 549, the right of appeal from the Board of County Commissioners in such cases, under the Indiana statutes on the subject, has been regarded as established. That case, however, does not so decide, nor contain anything to justify an inference to that effect; and in only one of the many cases since decided in which reference was made to that decision has it been so interpreted. It has been cited frequently as authority for the proposition that under the general statute which authorizes appeals from decisions of county boards there is a right of appeal from any decision of a judicial character, made in any proceeding by a board of commissioners. *Bryan* v. *Moore*, 81 Ind., 9; *Board of Comm'rs* v. *Pressley*, 81 Ind., 361; *La Plante* v. *Lee*, 83 Ind., 155; *City of Indianapolis* v. *McAvoy*, 86 Ind., 587; *Miller* v. *Embree*, 88 Ind., 133; *Board* v. *Logansport &c. Co.*, 88 Ind., 199; *Board* v. *Karp*, 90 Ind., 541; *Padgett* v. *The State*, 93 Ind., 396; *City of Terre Haute* v. *Beach*, 96 Ind., 143; *City of Logansport* v. *La Rose*, 99 Ind., 117; *Strosser* v. *Ft. Wayne*, 100 Ind., 447; *Waller* v. *Wood*, 101 Ind., 138; *Platter* v. *Board*, 103 Ind., 360; *Bunnell* v. *Board*, 124 Ind., 1; *Farley* v. *Board*, 126 Ind., 469; *Indiana Improvement Co.* v. *Wagner*, 134 Ind., 698.

In none of these cases was there an appeal, or any question touching the right of appeal, from an order extending or affecting the limits of a city. In the last case the appeal was from an order of a board of commissioners, made in a proceeding to incorporate a town, that an election be held by the inhabitants of the territory to determine whether they would incorporate. The order was held to be not final and therefore not appealable, but in the course of the opinion it is said :

> "There was formerly some conflict in our decisions as to whether an appeal would lie from an order of a board of county commissioners incorporating, or refusing to incorporate a town. But in the case of *Grusenmeyer* v. *City of Logansport*, 76 Ind., 549, that question was set at rest, and it is no longer a matter of doubt that such appeal does lie."

Grusenmeyer and others, according to the report of the case, presented a petition for the incorporation of the town of Taberville, but it being claimed that the territory had already been annexed to the City of Logansport the Board of Commissioners rejected the petition; the petitioners took an appeal to the Circuit Court where a motion was made and sustained, to dismiss the appeal, and from that order an appeal was prosecuted to the Supreme Court, where counsel for the appellee, the city, advanced the following propositions:

> "1st. That the right of appeal is purely statutory; that the incorporation of towns is a special proceeding, under a statute which does not provide for an appeal; and that, under the doctrine of *Allen* v. *Hostetter*, 16 Ind., 15, no appeal is permissible. 2d. That, by section 10, article 6, of the Constitution, 'The General Assembly may confer upon the boards doing county business in the several counties powers of a local administrative character;' and that the power to incorporate towns is such a power, to be exercised by the board in its legislative discretion, and that from the exercise of such a power there can be no appeal. 3d. There can be no appeal, because the Circuit Court cannot 'make a final determination of the proceedings thus appealed, and cause the same to be executed;' that the Circuit Court cannot give the notice, receive the returns nor declare the result of the election; that it is not a question before the court, or with which it has anything to do; it is a legislative act; and the court, having no power to move in the premises, cannot compel the board to do it."

The authorities touching the first proposition are reviewed at length, but the others are disposed of briefly at the end of the opinion, where it is said:

> "We therefore hold, that, under section 31 of the general law, there is a right of appeal from any decision of a judicial character, made by a County Board in any proceeding, unless the right is denied expressly or by necessary implication, and such implication does not arise from the fact that the judgment is declared to be conclusive. It can hardly be necessary to add that nothing is herein said or decided which can be construed to imply a right of appeal from the decisions of the boards upon matters of discretion. The second proposition of the appellant is disposed of by *Taylor* v. *The City of Fort Wayne*, 47 Ind., 274. The board has no discretion to grant or refuse the application, if the preliminary proper steps have been taken by the petitioners. The decision of the board, in such a case, is judicial, and not merely administrative or legislative. In answer to the third proposition, it is enough to say that the Circuit Court, under its general powers, and under the 37th section of the act of June 17th, 1852, before referred to, has ample power to dispose of the case on appeal."

In *Taylor* v. *Ft. Wayne*, as in the cases of *Grusenmeyer* v. *Logansport* and *Indiana Improvement Co.* v. *Wagner*, the proceedings was under the act of May 11, 1852 (secs. 4314 (3293)—4322 (3301), Revisions of 1894 and 1881), to incorporate a town. Under the provisions of that act the Board of Commissioners are given no discretion, except such as any court has in respect to the weight and sufficiency of evidence adduced, but, upon satisfactory proof of certain facts which must be set out in the petition, are required to order an election "to determine whether such territory shall be an incorporated town," and upon the return of the vote, if favorable to incorporation, to "make an order declaring that said town has

been incorporated," and after setting out the provisions of the statute the court said:

> "The statute conferred power and authority upon the board of county commissioners to hear and determine the application of the appellants, and whether the requirements of the act, under which the application was made, had been fully complied with. The board had acquired jurisdiction. It was their duty to proceed with the consideration of the cause, and if the evidence was sufficient to satisfy them that the requirements of the law had been complied with, to make the proper order, provided for in section 5. The appellants were entitled to the order that the meeting and vote provided for in the statute might be had; and if in favor of the proposition, they were also entitled to the order provided for in section 9; after which, the territory would be an incorporated town, by the name adopted."

It was an interpretation and reaffirmance of this construction of the statute that it was said in the Grusenmeyer case that

> "the board has no discretion to grant or refuse the application, if the preliminary steps have been taken by the petitioners," that "the decision of the board, *in such a case*, is judicial, and not merely admistrative or legislative;"

and hence that there was a right of appeal.

"Such a case," however, is not the one before us, which arose under a radically different statute, whereby it is left to the discretion of the board, according to its own opinion, to grant or refuse the proposed annexation. Such discretion is of the essence of a legislative power. In the proceeding under the act of 1852, for the incorporation of towns, all discretion is left to the voters of the district which it is proposed to incorporate, while the powers given to the boards of commissioners are to hear proofs, determine facts, declare their conclusion, and

make the proper order. Such powers are essentially judicial, and from decisions made in the exercise of them, though incidental to a legislative end or proceeding, it was competent for the legislature to allow an appeal. That much the cases, which we have been comparing, mean, but they do not mean that appeals may be prosecuted from decisions upon matters of discretion, whether legislative or judicial, unless, it may be, in cases of gross abuse of judicial discretion. On the contrary, by the Grusenmeyer case, and by many other decisions in Indiana and elsewhere, the right of appeal from discretionary orders is denied. *Hannah* v. *Board*, 29 Ind., 170; *Moffat* v. *State*, 40 Ind., 220; *City of Ft. Wayne* v. *Cody*, 43 Ind., 200; *Alexander* v. *Gravel Road Co.*, 44 Ind., 430; *Catterlin* v. *City of Frankfort*, 87 Ind., 45; *Hunt* v. *State*, 93 Ind., 311; *Waller* v. *Wood*, 101 Ind., 139; *Platter* v. *Board*, 103 Ind., 360, 374; *Farley* v. *Board*, 126 Ind., 468; *Bunnell* v. *Board*, 124 Ind., 1; *The State* v. *Board*, 131 Ind., 90; *Motz* v. *City of Detroit*, 18 Mich., 495; *Owen* v. *Mayor of Albany*, 15 Wend., 374; *Commonwealth* v. *Woods*, 44 Pa. St., 113; *Foster* v. *Nelson*, 2 Peters, 253; *Jones* v. *United States*, 137 U. S., 202; *In Re Cooper*, 143 U. S., 472.

By the act of May 31, 1879, a right of appeal to the Circuit Court "in the proceedings before the Boards of County Commissioners for the annexation of territory to cities and towns against the will of the owner" was expressly given both to the petitioner and to the owner of any portion of the territory proposed to be annexed; but manifestly it was not intended thereby to take away or modify the discretion with which the act of 1867, section 3,660, *supra* clothes the board, nor to give an appeal from any decision of the board in so far as in the particular instance it was discretionary. But in so far as the

board, in any such case, determines questions of fact, which are essential either to the jurisdiction of the board in the proceeding or to the right of annexation, as for instance, the fact and sufficiency of notice, contiguity and ownership of lands, or whether the lands had been platted, its action is of a judicial character and may properly be made subject to review on appeal. That is to say, if the board should order an annexation of territory which was not contiguous, or of contiguous territory without proper notice of the proceeding having been published, an aggrieved owner of land might appeal; or, on the other hand, if upon proper petition and notice the board should order the annexation of only a part of the land sought to be annexed, or should deny the petition *in toto*, putting its decision expressly and solely upon the ground that the territory was not contiguous, or that the names of the true owners of the land were not given, or that the notice was insufficient, or that the lands had been platted by the owner before the proceedings were commenced, the appeal doubtless might be prosecuted by the petitioner; but in respect to the reasons for annexation, in so far at least as they should be designed and be of a nature only to affect the opinion of the board in respect to the propriety or policy of the proposed annexation, the statute cannot reasonably be said to have been intended to give an appeal, and if so intended it was to that extent ineffectual, as an attempt to give the courts a legislative power. See *Commissioners of Drainage District* v. *Griffin*, 134 Ill., 330, 341. In disposing of any such appeal the Circuit Court, it would seem clear, must confine itself to questions of a judicial character, and according to the circumstances enter a final order or send the case back to the Board of Commissioners, but in no case may order annexation unless the record shows that in the

opinion of the board, if the proceedings were regular, the prayer of the petition ought to be granted.

But at this point we are confronted with the decision of the Supreme Court of Indiana, affirming the judgment of the Porter Circuit Court, whereby the annexation was ordered, which we are asked to treat as null and void. In the original opinion, which was delivered prior to the hearing before us, the question of the jurisdiction of the courts over the subject-matter was not mentioned, 40 N. E. 267, but in the opinion upon a petition for a rehearing, 42 N. E.—, the court says:

> "One of the positions taken by counsel in support of their petition for a rehearing of this case is that the Circuit Court had no jurisdiction of the appeal from the board of county commissioners, for the reason that the annexation of territory to a city is a legislative, and not a judicial function, and, as such, in case of unplatted lands, the board of county commissioners is given sole and final jurisdiction in the premises. The proposition so advanced was not urged in the original argument, nor on the trial of the cause, and is now brought to our attention for the first time; but, as it is a question that affects the jurisdiction of the trial court, and also of this court, it is one that will be entertained at any time. It may be conceded that annexation of territory to a city is a legislative function. This function is exercised by the common council when it resolves to annex certain described lands to the city, and to present a petition therefor to the county board. It must be admitted, however, as we think, that the after proceedings had upon the petition are of a judicial nature. The petition must give the reasons why, in the opinion of the council, the annexation should take place. The sufficiency of such reasons, and whether they in fact exist, calls for the decision of the tribunal appointed to hear the petition. Notice of the presentation of the petition is also provided for, and adverse parties are thus brought in. Whether the proper preliminary steps have been

taken, whether the reasons given in the petition are true and are sufficient, seem to be questions calling for a judicial examination and decision. In a similar case (*Grusenmeyer* v. *City of Logansport*, 76 Ind., 549) it was said by Woods, J., speaking for this court, that 'the decision of the board in such a case is judicial, and not merely administrative or legislative.' But if the board, in considering and deciding upon the petition, acts in a judicial capacity, certainly the legislature may, as it has done in this case, provide for an appeal to the courts, to determine whether the city council and the county board have complied with the statutory requirements in the action taken. It is the law itself, as has been said, that fixes the conditions of annexation; and the office of the board and of the court is to determine whether the conditions so prescribed by the law have been complied with. The legislature has expressly provided for such judicial determination by the board and for an appeal therefrom to the courts, and this court has frequently recognized the right to such appeal. Section 4,224, Rev. St., 1894 (section 3242, Rev. St., 1881); *Catterlin* v. *City of Frankfort*, 87 Ind., 45; *Chandler* v. *City of Kokomo*, 137 Ind., 295, 36 N. E. 847; *Wilcox* v. *City of Tipton* (at this term), 41 N. E.—; see, also, *Manufacturing Co.* v. *Emery* (at this term), 41 N. E., 814. See, also, *City of Wahoo* v. *Dickinson*, 23 Neb., 426, 36 N. W., 813."

That the Grusenmeyer case is not similar but radically different has already been explained, and while the other cases referred to recognize the right of appeal in proceedings for annexation they do not countenance appeals in respect to matters of discretion. On the contrary, in *Catterlin* v. *Frankfort* the disputed questions were of a judicial character, and in the course of the opinion it is said that the statute not having prescribed what reasons for the proposed annexation shall be set forth in the petition, "their sufficiency is necessarily left to the sound dis-

cretion of the authority passing upon the petition ''—that is to say, to the Board of Commissioners.

This expression of the Catterlin case is quoted and reaffirmed in the later cases cited. In *Chandler* v. *Kokomo*, after quoting it, the court adds:

> ''If, as indicated, the sufficiency of the reasons is a question within the sound discretion of the authority to which they are addressed, we could not review the exercise of that discretion unless, possibly, we should find that it had been palpably abused;''

and to the same point in *Manufacturing Co.* v. *Emery* it is said:

> ''If we could review the exercise of discretion as to the sufficiency of the reasons stated for annexation when it had been palpably abused—a question we do not decide—we would be compelled to adjudge that there was no such abuse in this case.''

It is evident that in these utterances it was assumed that the discretion referred to was a judicial discretion, and if that were so there might doubtless be a review in cases of palpable abuse, but once it is conceded to be a legislative discretion, its exercise by the power which possesses it can be reconsidered or revoked, as we suppose, only by the same or a higher legislative power. The cases cited, except that from Nebraska, decide nothing to the contrary.

It being conceded that the annexation of territory to a city is a legislative function, the proposition that under the statute

> ''this function is exercised by the Common Council, when it resolves to annex certain described lands to the city and to present a petition therefor to the County Board,''

is, we think, untenable. Legislative power over a subject, though delegated to a subordinate agency, must in

the nature of things be dominating, and, if it be regularly exercised, the result must be as conclusive as if accomplished by direct legislative enactment. If it be subject to any other power it is not legislative.

In cases of the annexation of unplatted lands against the will of the owner, the Common Council does not "resolve to annex." It has power, and can lawfully "resolve," simply to petition for the annexation of territory of defined limits, and only in respect to the limits of the territory has it a discretion which is final or conclusive. A Board of Commissioners in Indiana cannot order the annexation of less or more or different territory than that described in the petition; the *City of Peru* v. *Bearss*, 55 Ind., 576; but the final power to determine whether the annexation asked shall be ordered is given to the County Board and is made wholly discretionary. The vital distinction seems to have been overlooked, that this statute does not in all particulars "fix the conditions of annexation," and it is not the office of the board simply to determine "whether the conditions so prescribed by the law have been complied with." The proceedings may be in all respects regular, and the board may find that the reasons for annexation set forth in the petition are true as stated, and yet may disregard them, and either refuse or grant annexation upon considerations not mentioned in the petition. Without a petition nothing can be done, but once a petition has been presented the board acquires control of the subject-matter and upon proper notice may order the annexation, "if after inspection of the map and of the proceedings had in the case such board is of opinion that the prayer of the petition should be granted." That is to say, the board is given unqualified discretion in respect to final action upon a subject which is confessedly legislative. It is, therefore, neces-

sarily a legislative discretion, over which, consistently with the constitutional distribution of powers, the courts could not be given and cannot assume control.

Platted lands contiguous to a city may be annexed simply by resolution of the Common Council, and unplatted lands with the consent of the owner may be so annexed. For such cases it may be true in a sense that the legislative function and discretion are bestowed on the Common Council, or on the council and owner of the land together, though it may be more accurate to say, in respect to that class of cases, as the court below said more generally, that there is no delegation of legislative power,—the platting of the land, or the consent of the owner, and the annexing resolution of the Common Council being merely the antecedent facts upon which the statute *ex proprio vigore* effects the annexation.

It is immaterial here, except for the purposes of comparison or contrast, which of these views is the correct one. Let it be conceded that in such a case the legislative function is exercised by the Common Council when it resolves to annex. Such an act is of a legislative aspect because it is discretionary and conclusive in respect to a legislative subject.

It was in accord with this view that the court in *Chandler* v. *The City of Kokomo*, *supra*, declared that

> "the only feature in which the jurisdiction of the Common Council and that of the Board of Commissioners were distinguished was in the one fact as to whether the lands to be annexed were platted or not," and then added: "This fact was clearly a jurisdictional fact, and it was, as such, not only necessary to be alleged, but, also, to be proven."

That is to say, if the jurisdiction of one is legislative, so is that of the other, the Common Council being empowered to annex platted lands, or unplatted lands with

the owner's consent, and the board being authorized to act only in respect to unplatted lands.

In the case of the *City of Delphi* v. *Startzman*, 104 Ind., 343, the court says:

> "Our decisions have uniformly declared that in such a case as this (that is, where the territory is not platted), the city must petition the Board of County Commissioners and secure an order from that body. . . . This case does not belong to the class over which the Common Council has jurisdiction; on the contrary it belongs to a class over which the Board of Commissioners has exclusive, original jurisdiction."

In the same opinion is found the following statement, which treats the subject as political or legislative:

> "The question is not simply one of relief from taxation, but the question is as to the right to compulsorily change the property of the citizens from the territorial limits of one political corporation into those of another and different corporation. It is, in fact, a question as to the right to supplant one local government by another."

In *Stilz* v. *Indianapolis*, *supra*, it was explicitly held that the statute, which we are considering, "should be closely construed, because it is a delegation of legislative power." But if thereby the boards have legislative power, it must consist in the discretion given them to grant or refuse a petition for annexation. No other power is given which can be called legislative, unless the dictionaries and adjudications alike are to be disregarded.

The hearing upon this appeal had been had before the decision upon the petition for a rehearing in the state court was rendered, and before we had knowledge of it we had in consultation agreed upon the opposite view. That decision—in which for the first time the court has recognized the right of appeal to the Circuit Court from

a decision of a County Board refusing to order an annexation of territory to a city—it is clear, was the result largely of a misapprehension of the Grusemeyer case and in part of the decision below in this case, which itself is due partly to the same misapprehension and partly to the supposed effect of the constitutional inhibition against special legislation—a matter which we do not regard as of controlling significance. Under the circumstances, are we required to yield our judgment to the authority of that ruling?

We think it indisputable that the creation of municipal corporations, including the changing of municipal boundaries, like the law of real estate, is a local subject, in respect to which the Federal courts follow the established local rules. "The well-settled rule in this court," said the Supreme Court in *Luther* v. *Borden*, 7 How., 40, "is, that the courts of the United States adopt and follow the decisions of the state courts in questions which concern merely the constitution and laws of the state." See, also, *Bucher* v. *Cheshire R. R. Co.*, 125 U. S., 582. The subject was more fully considered in *Burgess* v. *Seligman*, 107 U. S., 20, where, in respect to the liability of stockholders under a statute of Missouri, the Supreme Court of that state had passed upon the questions involved in the case, "and (as here) on the very transaction" which the Federal Supreme Court was considering, and the latter court, with an avowed purpose to obviate misapprehension of expressions used in earlier decisions, said:

> "We do not consider ourselves bound to follow the decision of the state court in this case. When the transactions in controversy occurred, and when the case was under the consideration of the Circuit Court, no construction of the statute had been given by the state tribunals contrary to that given by the Circuit Court. The Federal courts have an inde-

pendent jurisdiction in the administration of state laws, co-ordinate with, and not subordinate to, that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the state, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of state constitutions and statutes. Such established rules are always regarded by the Federal courts, no less than by the state courts themselves, as authoritative decisions of what the law is. But where the law has not been thus settled, it is the right and duty of the Federal courts to exercise their own judgment, as they also always do in reference to the doctrines of commercial law and general jurisprudence. So when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or where there has been no decision, of the state tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the Federal courts will lean toward an agreement of views with the state courts if the question seemed to them balanced without doubt. Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well-considered decisions of the state courts. As, however, the very object of giving to the national courts jurisdiction to administer the laws of the

states in controversies between citizens of different states was to institute independent tribunals which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication. As this matter has received our special consideration, we have endeavored thus briefly to state our views with distinctness, in order to obviate any misapprehensions that may arise from language and expressions used in previous decisions. The principal cases bearing upon the subject are referred to in the note, but it is not deemed necessary to discuss them in detail.

"In the present case, as already observed, when the transactions in question took place, and when the decision of the Circuit Court was rendered, not only was there no settled construction of the statute on the point under consideration, but the Missouri cases referred to arose upon the identical transactions which the Circuit Court was called upon, and which we are now called upon to consider. It can hardly be contended that the Federal court was to wait for the state courts to decide the merits of the controversy and then simply register their decision; or that the judgment of the Circuit Court should be reversed merely because the state court has since adopted a different view. If we could see fair and reasonable ground to acquisce in that view, we should gladly do so; but in the exercise of that independent judgment which it is our duty to apply to the case, we are forced to a different conclusion. *Pease* v. *Peck*, 18 How., 595, and *Morgan* v. *Curtenius*, 20 id., 1, in which the opinions of the court were delivered by Mr. Justice Grier, are precisely in point."

In *Pease* v. *Peck* the court said:

"There are, it is true, many *dicta* to be found in our decisions, averring that the courts of the United States are bound to follow the decisions of the state courts on the construction of their own laws. But although this may be a correct yet a rather strong expression of a general rule, it cannot be received as

the enunciation of a maxim of universal application. Accordingly, our reports furnish many cases of exceptions to it. In all cases where there is a settled construction of the laws of a state, by its highest judicature, established by admitted precedent, it is the practice of the courts of the United States to receive and adopt it without criticism or further inquiry. But when this court have first decided a question arising under state laws, we do not feel bound to surrender our convictions on account of a contrary subsequent decision of a state court, as in the case of *Rowen* v. *Runnels*, 5 How., 139. When the decisions of a state court are not consistent, we do not feel bound to follow the last, if it is contrary to our own convictions,—and much more is this the case, where, after a long course of consistent decisions, some new light suddenly springs up, or an excited public opinion has elicited new doctrines, subversive of a former safe precedent. Cases may exist also, when a cause is got up in a state court for the very purpose of anticipating our decision of a question known to be pending in this court. Nor do we feel bound in any case in which a point is first raised in the courts of the United States, and has been decided in a Circuit Court, to reverse that decision contrary to our own convictions, in order to conform to a state decision made in the meantime. Such decisions have not the character of established precedent declarative of the settled law of a state. Parties who, by the constitution and laws of the United States, have a right to have their controversies decided in their tribunals, have a right to demand the unbiassed judgment of the court."

The decision of the state court, which we are asked to follow, seems to us to be in plain conflict with the weight and general current of authority on the subject. It is, too, not only not the logical result of the previous decisions of that court, which may be deemed relevant to the question, but, as we think, distinctly inconsistent with them, and, therefore, ought not to be accepted as a dec-

laration of the settled law of the state. Nor can we yield to the view, so enunciated, on the ground that the question is "balanced with doubt."

> "If we could see fair and reasonable ground to acquiesce in that view we would gladly do so, but in the exercise of that independent judgment, which it is our duty to apply to the case, we are forced to a different conclusion."

We think that upon the facts alleged the Circuit Court erred in refusing a temporary restraining order and in dismissing the bill. The order of dismissal is, therefore, reversed, and the cause remanded with instruction for further proceedings not inconsistent with this opinion.

Caroline M. Forsyth,
Appellant,
264 *vs.*
City of Hammond *et al.*

Appeal from the Circuit Court of the United States for the District of Indiana.

This cause came on to be heard on the transcript of record from the Circuit Court of the United States for the District of Indiana, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said Circuit Court refusing a temporary restraining order in this cause be and the same is hereby reversed with costs; and that this cause be and the same is hereby remanded to the said Circuit Court with directions to take such further proceedings as are not inconsistent with the opinion of this court.

And afterwards, to wit, on the 14th day of February, A. D. 1896, came the appellees by their counsel and filed their petition for a rehearing in said above-entitled cause.

And on the same day, to wit, the 14th day of February, A. D. 1896, came the appellees by their counsel and filed in the office of the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit their notice in the above-entitled cause, which said notice was in the following words and figures:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

October Term, A. D. 1895.

Caroline M. Forsyth, *Appellant*,
vs.
City of Hammond and William Kleihege, Treasurer, *Appellees*. } No. 264.

To Thomas J. Merrifield, W. H. H. Miller, John B. Elam, Ferdinand Winter, Lyman Trumbull, P. Trumbull and Walter Olds, Counsel for Appellant:

Please take notice that we have this day filed with the Clerk of the Circuit Court of Appeals for the said Seventh Circuit a petition for rehearing, with certificate and argument on behalf of the appellees in said cause, and that herewith we deliver to, and serve upon each of you, copies of said petition, certificate and argument, all in accordance with the rules of said United States Circuit Court of Appeals for said Seventh Circuit.

Dated February 14th, A. D. 1896.

CHARLES H. ALDRICH,
FRANK F. REED and
E. D. CRUMPACKER,
Counsel for Appellees.

We severally acknowledge receipt of a copy of the said petition for rehearing, certificate and argument thereon this 14th day of February, A. D. 1896.

WALTER OLDS,
LYMAN TRUMBULL,
PERRY TRUMBULL,
Counsel for Appellant.

Thursday, March 5, 1896.

Court met pursuant to adjournment.

Hon. William A. Woods, Circuit Judge; Hon. James G. Jenkins, Circuit Judge; Hon. John W. Showalter, Circuit Judge.

Caroline M. Forsyth,
Appellant,
264 *vs.*
City of Hammond *et al.*

It is ordered by the court that appellant be and is hereby allowed ten days from this date in which to reply to appellees' petition for a rehearing.

Friday, June 5, 1896.

Court met pursuant to adjournment.

Present: Hon. William A. Woods, Circuit Judge; Hon. James G. Jenkins, Circuit Judge; Hon. John W. Showalter, Circuit Judge.

Caroline M. Forsyth,
Appellant,
264 *vs.*
City of Hammond *et al.*

It is ordered by the court that the petition for rehearing in this cause be and the same is hereby overruled. And it is further ordered that mandate be withheld by the clerk of this court until further order of court.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

I, Oliver T. Morton, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed and typewritten pages, numbered from one to fifty-one inclusive, contain a true copy of the transcript of the record and proceedings in the United States Circuit Court of Appeals for the Seventh Circuit in the case of Caroline M. Forsyth, appellant, *vs.* City of Hammond *et al.*, No. 264, October Term, 1895, as the same remains upon the files and records of the said United States Circuit Court of Appeals for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of the United States Circuit [SEAL.] Court of Appeals for the Seventh Circuit, at the City of Chicago, this 6th day of August, A. D. 1896.

OLIVER T. MORTON,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

EXHIBIT D.

HAMMOND, IND., July 20th, 1896.

HON. CLAUDE MATTHEWS,
Governor of Indiana.

My Dear Sir: As mayor of the City of Hammond, I desire to lay before you for official consideration the following statement of facts: In February, 1893, the Common Council of the City of Hammond, by a resolution duly adopted, declared its purpose to annex to that city certain unplatted lands adjoining its boundaries on the north. In pursuance of such resolution, notice was duly given that a petition would be filed before the Board of Commissioners of Lake County at its June session, 1893, asking for the annexation of such lands. A petition, in due form, was presented to the County Board at the time fixed in the notice and was accompanied by a plat of the lands sought to be annexed, as required by law. A number of persons who owned land in the territory described in the petition appeared to the proceedings before the Board of Commissioners and filed remonstrances against the annexation. The County Board refused to grant the prayer of the petition, and the city appealed to the Lake Circuit Court, under the provisions of the law authorizing appeals in such cases. A change of venue was taken and the cause was sent to the Porter Circuit Court, where it was tried in January, 1894, and resulted in a judgment in favor of the city, annexing the territory as prayed for in the petition. All the remonstrants who appeared before the County Board appeared to the proceedings in the Porter Circuit Court, and contested the granting of the petition both upon the law and upon facts. Caroline M. Forsyth, a remonstrant who appeared before

the board and in the Circuit Court as aforesaid, appealed to the Supreme Court of this state from the judgment of the Porter Circuit Court. That judgment was affirmed on its merits by the Supreme Court on the 11th day of April, 1895. (See *Forsyth* v. *City of Hammond*, 142 Ind., 505.) The proceedings before the County Board and in the Circuit Court were regular and in conformity to the requirements of the law, and the judgment of annexation was final. After the judgment had been affirmed by the Supreme Court, said Caroline M. Forsyth filed a bill in the U. S. Circuit Court for the District of Indiana against the City of Hammond to enjoin the city from exerting municipal authority over the annexed territory, on the ground that the annexation of territory to a city is a legislative power, and, under the constitution of Indiana, it cannot be conferred upon the courts. The bill was dismissed for want of equity by the U. S. Circuit Court, and an appeal was taken from that judgment to the U. S. Circuit Court of Appeals, sitting at Chicago. The cause was fully argued there, and that court, in an opinion by Woods, J., reversed the judgment of the U. S. Circuit Court, and remanded the cause with instructions to grant the injunction against the city. The reversal was predicated upon the ground that all the proceedings for annexation of the territory after the County Board refused to grant the petition were void. The Supreme Court of this state held that the legislative power was exercised by the city in declaring its purpose to make the annexation and that the proceedings before the County Board were for the purpose of ascertaining whether the conditions existed authorizing the city to make the annexation, and presented only judicial questions which were appealable. Caroline M. Forsyth was a party to and contested all the proceedings in the state courts and final judgment was

rendered against her and other remonstrants, which was affirmed upon her own appeal to the Supreme Court. The cause had been finally decided in the Supreme Court before the bill for injunction was filed in the Federal court. Caroline M. Forsyth was a resident of the State of Illinois, and the diverse citizenship of the parties gave the Federal court jurisdiction. There are numerous owners of land in the territory annexed who live in this state and consequently can not bring suits in the Federal courts, but are bound by the decisions of our state courts. The conditions are such as to greatly embarrass the administration of the municipal affairs. Under the judgment of the courts of our own state, it is the duty of the city to exercise municipal authority over the annexed territory, while the Federal courts have enjoined the exercise of such authority. Which master shall we serve? The question is local and political and arises upon the construction of an Indiana statute. I am advised by the city attorney that the Supreme Court of this state has the power to construe our own statutes and that its judgments are binding and conclusive upon all who are within its jurisdiction. The Federal court denies this proposition and has overturned the decision of the Supreme Court of this state upon this local political question, at the suit of one who was within the jurisdiction of the Supreme Court and was bound by its decision, if the decision has any binding force at all.

It is the desire and the purpose of the city authorities to respect and enforce the judgment of the state courts, but if they undertake it, there will doubtless be a conflict of authority. The Federal court will treat as a contempt any attempt to override its decree. If this question can only be settled by a resort to force it might as well be settled at one time as another, and as Mayor of the city I

appeal to you for assistance in enforcing the judgment of the courts of our own state. The question is one of vital importance to the dignity and power of the state. If the judgments of the courts of this state are subject to collateral review by the Federal courts, let it be known and we will take our place in the galaxy of states, not as a sovereignty, but as a servile dependency. You are charged with the duty of executing the law and enforcing the rights of the state, and in that character I earnestly appeal to you for assistance in the present emergency.

Awaiting your reply, I am,

Your obedient servant,

FRED R. MOTT, *Mayor.*

EXHIBIT E.

INDIANAPOLIS, Ind., July 24, 1896.

FRED R. MOTT, ESQ.,

Mayor of City of Hammond,

Hammond, Indiana.

My Dear Sir: Answering your favor of the 20th inst., in regard to the extraordinary complications that seems to have arisen, growing out of the fact that the United States Circuit Court of Appeals felt at liberty to establish a different rule in relation to matters of purely local law from that that had been deliberately established by the Supreme Court of this state, I beg to say that I have had the different decisions examined and the following facts are reported to me, namely:

1. The petition for the annexation was filed in the Commissioners' Court for the June term, 1893.

2. This petition was finally disposed of in the Commissioners Court on June 10th, 1893.

3. An appeal was perfected to the Circuit Court of Lake County, from which a change of venue was granted to Porter County, September 5th, 1893.

4. That there was a trial in the Porter Circuit Court resulting in a judgment on the 26th of January, 1894, annexing the property in controversy to the City of Hammond.

5. From this judgment Mrs. Forsyth appealed to the Supreme Court of the state, where the transcript was filed on the 26th of April, 1894.

6. The judgment of the court below was in all respects affirmed on the 11th of April, 1895. (142 Ind., 505.)

7. On the 11th of April, 1895, Mrs. Forsyth filed her bill against the City of Hammond to enjoin the collection of taxes levied for city purposes by the City of Hammond.

8. On the 8th of June a petition for rehearing was filed in the Supreme Court of Indiana.

9. On the 3rd of July, 1895, the United States Circuit Court dismissed the bill for want of equity. (68 Fed. Rep., 774.)

10. An appeal was taken to the United States Circuit Court of Appeals for the Seventh Circuit, where, on the 16th of January, 1896, the judgment of the Circuit Court was reversed and the cause was remanded with instructions to proceed in accordance with the views announced in the opinion. (71 Fed. Rep., 443.)

So far as I can learn, no injunction, either temporary or final was ever granted by the United States Court.

I am not versed in the technicalities of law, but looking at the opinion of the United States Circuit Court of Appeals, it occurs to me that the opinion of Judge Woods proceeds rather upon the theory that he was delivering a

moot court opinion as to what was the better rule of law, than deciding a case involving legal questions and challenging the judicial functions of a court.

As I understand the situation, it is not so much whether the opinion of Judge Howard, of the Supreme Court of Indiana, concurred in by four other judges of high standing and character, is entitled to greater weight as authority than that of the three judges who occupy the positions upon the United States Circuit or District bench that entitles them to sit as members of the Circuit Court of Appeals. If that were a question for my opinion, I might be loth to express an opinion, but my understanding is that the decision is made in a case pending in a court to determine the rights of the parties before it, and if so it should be settled upon legal principles and not upon the question as to who are the better lawyers or judges.

I am informed that in the Circuit Court of Porter County the court had jurisdiction of the subject-matter and of the parties, and in the exercise of the jurisdiction adjudged the property in controversy was annexed to and become a part of the City of Hammond. If so, that was a judgment binding upon all the world, United States Courts high and low, and is not to be collaterally attacked or disregarded by any judicial authority known to the law. If this were not so, there would be no safety in applying to the courts for relief.

However that may have been done, I think the United States Circuit Court of Appeals must have overlooked the fact, or it could not have been brought to its attention, that it had been adjudged by the Circuit Court of the state, and that judgment affirmed by the Supreme Court of Indiana, that the territory in controversy was properly annexed to the City of Hammond.

It seems to me inconceivable that any court, in the face

of such information, could have rendered the opinion that was rendered by the United States Circuit Court of Appeals.

In view of the fact that there is no injunction against the collection of the taxes, I can at present only advise you to proceed in the manner prescribed by the statute for the collection of taxes that have been levied against this land. It will be time enough to determine what further steps should be taken in case any attempt is made to interfere with your officers in the discharge of their duties. Whenever it is decided by the United States Court that a judgment of the state court affecting the status of Mrs. Forsyth's land is a nullity and can be disregarded, it will be time enough then to recommend a removal of the question to the Supreme Court of the United States upon a certiorari. Until that time, I see no reason why the officers should not proceed to distraint and sale in the collection of these taxes. When that time comes, it is a matter of proceedings in courts to be attended by lawyers, in which case I have no doubt that the rights of the City of Hammond and the jurisdiction of the courts of the State of Indiana will be respected, notwithstanding, as an abstract proposition, the learned judges of the United States Circuit Court of Appeals may differ from their brethren on the bench of the Supreme Court of this state.

Very respectfully yours,

CLAUDE MATTHEWS,

Governor of Indiana.

64-706

Office Supreme Court, U. S.
FILED
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JAMES H. McKENNEY,
CLERK.

164-706

Supreme Court of the United States.

OCTOBER TERM, A. D. 1896.

IN THE MATTER OF THE APPLICATION OF THE CITY OF HAMMOND FOR A WRIT OF CERTIORARI

IN THE CASE OF

CAROLINE M. FORSYTH, *Appellant*,

vs.

THE CITY OF HAMMOND AND WILLIAM KLEIHEGE, TREASURER OF THE CITY OF HAMMOND, *Appellees.*

615

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

CHARLES H. ALDRICH,
FRANK F. REED,
E. D. CRUMPACKER,
Solicitors for Petitioner.

Eastman Bros., Law Printers, 358 Dearborn St., Chicago.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1896.

IN THE MATTER OF THE APPLICATION OF THE CITY OF HAMMOND FOR A WRIT OF CERTIORARI

IN THE CASE OF

CAROLINE M. FORSYTH, *Appellant*,

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THE CITY OF HAMMOND AND WILLIAM KLEIHEGE, TREASURER OF THE CITY OF HAMMOND, *Appellees.*

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

CHARLES H. ALDRICH,
FRANK F. REED,
E. D. CRUMPACKER,
Solicitors for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Statement of the Case.

It appears from the petition for certiorari and accompanying records that in the year 1893 the common council of the City of Hammond, Indiana, resolved to annex certain contiguous territory not laid off in lots, and to the annexation of which the owners would not consent. A petition was subsequently filed before the board of county commissioners setting forth the reasons for such annexation, accompanied by a plat and an accurate description by metes and bounds of the territory proposed to be annexed to such city. The notice of publication required by law was also given.

The board of county commissioners received and considered the petition, heard the testimony for and against the annexation, and denied the petition. From this decision an appeal was prosecuted and perfected in apt time to the Circuit Court of Lake County, Indiana,[1] from which court a change of venue was afterwards taken to the Circuit Court of Porter County, Indiana, where the trial resulted in a verdict and judgment, reversing the action of the board of county commissioners and directing the annexation. From this judgment Caroline M. Forsyth, a citizen of the State of Illinois, owning 650 acres of the land sought to be annexed, appealed to the Supreme Court of the State of Indiana, which court affirmed the judgment of the Porter Circuit Court. (Record,

[1] The statutes under which these various proceedings were had appear in the Appendix.

p. 3). Mrs. Forsyth filed an elaborate petition and brief for a rehearing, in which every possible question was raised and discussed. This petition was overruled in an equally exhaustive opinion. (Record, p. 3.) Having been defeated in Indiana, Mrs. Forsyth filed her bill in the Circuit Court of the United States for the District of Indiana, wherein she sought an injunction against the City of Hammond and its treasurer from collecting taxes, exceeding $2,000, levied upon her land subsequent to the annexation, and a decree pronouncing the annexation null and void, and perpetually enjoining the city, its officers and agents, from entering upon or assuming any jurisdiction whatever over the complainant's lands, and for general relief. (Record, p. 4.) The grounds upon which the complainant appealed to the United States Court were found solely in the diversity of citizenship and the amount involved.

The reasons alleged against annexation may be summarized as follows:

First. That the complainant's lands are used solely for pasturage purposes, and no part of it has ever been mapped off or platted with a view to sale as platted land. The dwelling houses, twenty-one in number, are said to be remote from Hammond and so far from the police stations, fire-engine house and gas lamps of said city that

> "in the nature of things she [the complainant] can not receive any service, advantage or benefit from the municipal government of said city. That said lands were valued for taxation by said city at the rate of $250 to $500 per acre, and that said taxes amount to about $5 per acre; that said valuation is enormously in excess of the real value of said lands, and that said taxes are exorbitant, oppressive and extortionate." (Record, p. 35).

This may be construed as a denial that complainant's lands will be benefited by annexation.

Second. The territorial extent and population of Hammond is next averred, and that a large portion of the territory within the limits is uninhabited and unimproved. These are, as is averred, "much larger than is now or likely to be required for city purposes for many years to come, and that its present boundaries contain nearly 4,000 acres capable of conveniently containing and accommodating a population of almost a million of people." (Record, p. 35.) That the land in the city limits in part and adjacent to that sought to be annexed, as well as a portion of the latter, consists of shallow lakes, Wolf Lake and Lake George, having shores and margins of a marshy nature; the land between is described as low and swampy (Record, p. 36), and "the whole of said territory sought to be annexed, except the parts platted as aforesaid, consists in part of said ridges and sloughs."[1] (Record, p. 37.)

This, in short, is an averment that the city does not need the territory sought to be annexed.

Third It is next averred that the City of Hammond is indebted in a large amount, and that the attempted enlargement of its boundaries

> "was an abuse and violation of the franchises of said city, and a contemplated fraud upon the law of the State of Indiana, granting to cities the right to annex a reasonable quantity of contiguous lands

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1 These averments would seem to suggest the propriety of annexation for purposes of drainage, sewerage, etc., and to thereby promote the health of the people of the City of Hammond. It is thought, however, that these averments, as well as the reasons leading the municipality to seek annexation, are proper subjects for consideration in the state courts only, and are improperly submitted here after the trial and determination of the issues in the state tribunals.

> when said lands are needed for legitimate city purposes, and when the same are so benefitted or enhanced in value by their proximity to corporate municipalities that they ought, in justice, to share the burdens of the government thereof. That said attempt was dictated above all by covetousness and greed and a corrupt desire on the part of the authorities of said city to subject the land and property of your oratrix in the new territory . . . to the burdens of taxation . . . for the sole benefit of said city, and to raise means to pay off its heavy indebtedness and, thereby, relieve the inhabitants of the original and proper city from a portion of said indebtedness, without rendering any service, advantage or benefit whatever to the new subjects of taxation." (Record, p. 38.)

This may be considered the averment of corrupt or improper motives leading to the attempt to annex.[1]

Fourth. It is next averred that a narrow strip of land between the City of Hammond and the lands sought to be annexed had been, by and with the consent of the owners thereof, annexed to the City of East Chicago, Indiana, and thereby the complainant's and other lands had ceased to be contiguous and consequently ceased to be subject to annexation.[2]

This may be denominated the reason of non-contiguity.

It will be noticed that counsel who drafted this bill had no thought that the proceedings might be annulled because a legislative power had been delegated to the courts

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[1]That the motives of the city in proceedings to annex territory or for condemnation, or directing a public improvement, may be inquired into through bill in equity after an unsuccessful defense in the courts and by a party to such litigation is for the first time asserted in this case. The proposition has the merit of novelty if no other.

[2]The opinion sought to be reviewed pays no attention to this averment and in no wise rests thereon. As the trick, by which this defense was sought to be manufactured, was so palpable and so signally failed, for reasons given in the opinions of the courts, its effect is not discussed in the brief and argument which follows.

in providing for an appeal from the board of county commissioners. That theory was a later discovery.

This bill was amended (Record, p. 45) by repeating in substance the earlier averments above summarized, and by adding the later discovery in the following language, which we classify as the fifth reason :

> *Fifth.* "Complainant avers that she is advised and therefore charges the fact and the law to be that said appeal from said board of commissioners to Lake Circuit Court was without warrant of law, unauthorized and the proceedings therein had void, for that the annexation of territory to a city is a matter of legislative and not of judicial cognizance, and it was not competent for the legislature to commit the determination of the question to the courts and juries, and she further alleges that the pretended change of venue from the Lake to the Porter Circuit Court was without warrant of law, and conferred upon said last named court no jurisdiction in the premises." (Record, p. 53.)

The cause was submitted to the court upon "the bill of complaint, the amended bill of complaint, application for injunction, briefs and arguments of counsel" (Record, p. 56), and the injunction was denied and the bill dismissed for want of equity. (Record, p. 56.)

In the bill as amended the facts of the annexation proceedings and the litigation in the courts were briefly set forth, and the court in its opinion was therefore called upon to take notice of the decisions of the Supreme Court between the same parties. (Record, p. 60.)

The opinion is able and proceeds upon the following grounds—largely stated in the language found therein:

The courts admits the general proposition that the change of boundaries of cities and towns is a legislative and political act, and hence not properly conferred upon

the courts. The learned judge calls attention to the fact that in Indiana the constitution denies to the legislature the power to create municipal bodies or to enlarge or contract their boundaries by the enactment of special laws applicable to each particular municipality. These acts must be done under general laws, which

> "in the nature of things must be prospective and must specify the conditions on the happening of which such creation, enlargement or contraction may be made, and must provide some tribunal to determine the existence of these conditions. The power to hear and determine whether the conditions prescribed by law for the creation, enlargement or contraction of a municipal body exist, is judicial in its nature and may be appropriately conferred upon the courts. The creation, enlargement or contraction of a municipal body is not the act of the court, but is the act or result of the law. The court simply determines whether the conditions are present which authorize the creation of a municipal body or the enlargement or the contraction of the limits, and when these conditions are judicially ascertained the law *ex proprio vigore* creates the municipal body or enlarges or contracts its boundaries. The constitution compels the legislature to confide this power to some tribunal, and to none could it more appropriately have been confided than to the courts. It is the legitimate function of the courts to ascertain and determine the existence or non-existence of a given state of facts. The legislature is required, as we have seen, to provide by general laws for the creation of municipal bodies, and for the enlargement and contraction of their boundaries; and no limitation has been placed upon the power of the legislature to confer upon any tribunal it may select the authority to determine when the conditions are present which shall create, enlarge or contract municipal bodies. The power of the legislature in this regard being unlimited, it may exercise its own discretion in confiding to any tribunal it pleases the power to determine the existence of the condition which shall

give effect the general law touching the enlargement of municipal bodies." (Record, pp. 58–59.)

The learned judge next refers to the Indiana decisions recognizing this distinction and entertaining appeals in cases relating to the incorporation of cities and towns, and concludes:

> "The Supreme Court of the state in the recent case of *Forsyth* v. *City of Hammond*, 40 N. E. Rep., 267, has decided that the annexation of the lands of the complainant and others to the Citp of Hammond was lawfully made; and this court possesses neither the disposition nor the power to declare the annexation of the territory in question invalid. The decisions of the Supreme Court of the state on questions of local law are binding and conclusive on this court." (Record, 60.)

The Court of Appeals thought otherwise on all the questions here discussed and reversed the Circuit Court with instructions for further proceedings not inconsistent with its opinion. (Record, 92.)

The record shows that complainant's lands, 650 acres, are part and parcel of a total acreage of about 2,800 annexed under the proceedings of the city council and the courts of Indiana. In the present condition of affairs the remaining territory stands annexed and the city is authorized to extend its jurisdiction over the same. Taxes have been levied and improvements entered upon which are obligatory upon all other owners but the one who, having had her day in court with the other owners and been defeated, has been enabled, because of her citizenship and the large amount of land owned by her, to invoke the aid of the federal court. Under these circumstances, it is not remarkable that the city authorities, through the Mayor, should ask the Governor of Indiana.[1]

"Which master shall we serve? The question is

[1] Record, p. 98.

local and political and arises on the construction of an Indiana statute. I am advised by the city attorney that the Supreme Court of this state has the power to construe her own statutes, and that its judgments are binding and conclusive upon all who are within its jurisdiction. The federal court denies this proposition and has overturned the decision of the Supreme Court of this state upon this local political question, at the suit of one who was within the jurisdiction of the Supreme Court and was bound by its decision, if the decision has any binding force at all.

"It is the desire and purpose of the city authorities to respect and enforce the judgment of the state courts, but if they undertake it, there will doubtless be a conflict of authority. The federal court will treat as a contempt any attempt to override its decree. If this question can only be settled by a resort to force, it might as well be settled at one time as another, and as Mayor of the city I appeal to you for assistance in enforcing the judgment of the courts, of our own state. The question is one of vital importance to the dignity and power of the state. If the judgment of the Courts of this state are subject to collateral review by the Federal Courts let it be known and we will take our place in the galaxy of states, not as a sovereignty, but as a servile dependency. You are charged with the duty of executing the law and enforcing the rights of the state, and in that character I earnestly appeal to you for assistance in the present emergency."

Nor that the chief executive should answer:

"I am informed that in the Circuit Court of Porter County the court had jurisdiction of the subject matter and of the parties and in the exercise of that jurisdiction adjudged the property in controversy was annexed to and became a part of the City of Hammond. If so, that was a judgment binding upon all the world, United States courts high and low, and is not to be collaterally attacked or disregarded by any judicial authority known to the law. If this were not so there would be no safety in applying to the courts for relief.

> "However that may have been done, I think the United States Circuit Court of Appeals must have overlooked the fact or it could not have been brought to its attention that it had been adjudged by the Circuit Court of the state, and that judgment affirmed by the Supreme Court of Indiana, that the territory in controversy was properly annexed to the City of Hammond.
>
> "It seems to me inconceivable that any court in the face of such information could have rendered the opinion that was rendered by the United States Circuit Court of Appeals."[1]

The writer of this brief has never shared in the apprehensions professed by many, that the federal judiciary was arrogating to itself powers not warranted by the constitution of the United States; with those who have sought to make the question of "government by injunction" a political issue, he has no manner of sympathy; for the recent proposition to reorganize the federal courts to make them the creatures of popular clamor he has the most profound contempt. It is hoped this avowal may be deemed proper as preliminary to the statement, that in the writer's opinion no more grievous mistake was ever committed against the rights of a state, its political subdivisions and courts, than is exhibited in the opinion of the Circuit Court of Appeals here sought to be reviewed. The opinion is revolutionary and dangerous in all its tendencies, and is the single example afforded by the books that would, so far as the writer is acquainted with the decisions, give a semblance of truth to the charges of the demagogues of the present time.

Inasmuch as the decision leaves nothing for the lower court to do to obviate the conflict between the state and federal authorities, and the condition would not be changed by a decree in the court below reinstating the bill

[1] Record, p. 101.

and granting the injunction as prayed for, we have thought that this is the proper time to present this matter to this court.

It is submitted that the case presented is within the rule laid down in *American Construction Company* v. *Jacksonville Railway*, 148 U. S., 372, authorizing the writ of certiorari in a case presenting issues "of peculiar gravity and general importance," and "to secure conformity of decision." If this court shall order the record sent up for its consideration, it will "prevent extraordinary inconvenience and embarrassment in the conduct of the cause," as well as in the affairs of the City of Hammond, and a possible conflict between the state and federal authorities. It is submitted that such an "exceptional case" is presented as makes this the proper time for the issuance of the writ. It may be added that the Circuit Court of Appeals withheld its mandate that this application might be made and determined, and to the same end the writer of this brief has requested the city authorities to refrain from any attempts to enforce the collection of taxes against the property of Mrs. Forsyth, until the questions here presented have been passed upon in this court.

BRIEF.

I.

The court erred in taking cognizance of this proceeding or considering the same, because federal courts have no jurisdiction of a suit to set aside a decree of a state court on the ground that such decree is utterly void when tested by an inspection of the record, since in such a case a motion, appeal or bill of review in the court which made the decision is the proper and sufficient remedy.

Little Rock Junction Ry. v. *Burke* (C. C. App., Eighth Circuit), 66 F. R., 83.
Barrow v. *Hunton*, 99 U. S., 80.
Johnson v. *Waters*, 111 U. S., 640.
Marshall v. *Holmes*, 141 U. S., 589.
Graver v. *Faurot*, 64 F. R., 241.
Laing v. *Rigney*, 160 U. S., 531, 542.

II.

The judgment of the state courts having jurisdiction both of the person and property of the appellant was not subject to collateral attack in the Circuit Court of the United States, and it was error to sustain such an attack in this proceeding.

Mullikin v. *City of Bloomington*, 72 Ind., 161.
Loesnitz v. *Seelinger*, 127 Ind., 422.
Miller v. *United States*, 11 Wall., 268, 299.
Thornton v. *Baker*, 15 R. I., 553.

Osborn v. *Sutton*, 108 Ind., 443, 445.
Jackson v. *State*, 104 Ind., 516.
Wyatt's Adm. v. *Steele*, 26 Ala., 639, 650.
Vosler v. *Brock*, 84 Mo., 574, 578.
Florentine v. *Barton*, 2 Wall., 210, 216.
Foltz v. *St. L. & S. F. Ry. Co.*, 8 C. C. A., 635.
Elder v. *Richmond Gold & Silver Mining Co.*, 7 C. C. A., 354.
Bigelow v. *Chatterton*, 2 C. C. A., 402.
Donham v. *Springfield Hardware Co.*, 10 C. C. A., 294.
Evers v. *Watson*, 156 U. S., 527.
Dowell v. *Applegate*, 152 U. S., 327.
Des Moines Navigation Co. v. *Iowa Homestead Co.*, 123 U. S., 552.
Skirving v. *Life Ins. Co.*, 59 F. R., 742.
Pullman Car Co. v. *Washburn*, 66 F. R., 790.

III.

The validity of the annexation as between the parties to this record became res judicata by the decisions of the state courts, and it is error to treat it herein as res integra.

Clay v. *Deskins*, 11 C. C. A., 229.
Block v. *Commissioners*, 99 U. S., 686.
Green v. *Bogue*, 158 U. S., 478.
Last Chance Mining Co. v. *Tyler Co.*, 157 U. S., 683.
Foster v. *Givens*, 14 C. C. A., 625.
Wilson v. *Deen*, 121 U. S., 525, 532.

Nesbit v. *Independent Dist.*, 144 U. S., 610, 618.
Railroad Co. v. *Alsbrook*, 146 U. S., 279, 302.
McComb v. *Frink*, 149 U. S., 629, 641.

IV.

The decisions of the Supreme Court of Indiana establishing the validity of the annexation, and construing the statutes and constitution of that state, should have been followed in the federal court, and the court erred in refusing to be bound thereby.

Western Union Tel. Co. v. *Poe*, 64 F. R., 9, 12.
Sanford v. *Poe*, 69 F. R., 546, 548.
Chi., R. I. & P. Ry. Co. v. *Stahley*, 62 F. R., 363.
B. & O. R. R. Co. v. *Baugh*, 149 U. S., 368.
Miller v. *Ammon*, 145 U. S., 421, 423.
New York, etc., Co. v. *Bristol*, 151 U. S., 556.
Stutsman Co. v. *Wallace*, 142 U. S., 293.
Gormley v. *Clark*, 134 U. S., 338.
Hallinger v. *Davis*, 146 U. S., 314.
Kaukauna Co. v. *Green Bay Co.* 142 U. S., 254.
McElvaine v. *Brush*, 142 U. S., 155.
Lewis v. *Monson*, 151 U. S., 545.
Morley v. *Lake Shore Ry. Co.* 146 U. S., 162.
Bauserman v. *Blunt*, 147 U. S., 647.
Balkam v. *Woodstock Iron Co.*, 154 U. S., 177.
Union Bank v. *Kansas City Bank*, 136 U. S., 223.
Wilson v. *Perrin*, 11 C. C. A., 66.
Hoyt v. *Gleason*, 65 F. R., 685.
Park Bank v. *Remsen*, 158 U. S., 337.
Erie Ry. Co. v. *Pennsylvania*, 158 U. S., 431.

Lambert v. *Barrett*, 157 U. S., 697.
Bardon v. *Improvement Co.*, 157 U. S., 327.
Campbell v. *Haverhill*, 155 U. S., 610.
Marbury v. *Kentucky Co.*, 10 C. C. A., 393.
Laing v. *Rigney*, 160 U. S., 531, 542.

V.

The court erred in holding that it is competent for the legislature of Indiana to vest legislative power in the board of county commissioners.

Constitution, Art. 7, Sec. 1; Art. 3, Sec. 1; Art. 6, Sec. 10.
Burns Annotated Statutes, Sec. 7827.
City of Peru v. *Bearss*, 55 Ind., 576.

VI.

In the division of the powers of government demanded by the constitution of the State of Indiana, it is neither required nor contemplated that the line of demarcation shall be a distinct one, nor the separation absolute. The court erred in holding that the annexation of contiguous territory to cities against the will of the owner is purely legislative. Such power is judicial, and, under the constitution, exercisable by the board of county commissioners as a judicial body.

Morgan v. *Daniels*, 153 U. S., 120.
Knight v. *U. S. Land Assn.*, 142 U. S., 161.
Noble v. *Union River Logging Co.*, 147 U. S., 165.

Field v. *Clark*, 143 U. S., 649.
Montana Co. v. *St. Louis Co.*, 152 U. S., 160.
Burlington v. *Leebrick*, 43 Iowa, 252.
Catterlin v. *City*, 87 Ind., 45.
Windfall Co. v. *Emery*, 41 N. E., 814.
Supervisors v. *U. S.*, 4 Wall., 435.
Kayser v. *Trustees*, 16 Mo., 88.
Borough of Little Meadows, 35 Pa. St., 335.
Gottschalk v. *Becher*, 49 N. W., 715.
Elder v. *Incorporators*, 21 S. E., 738.
Forest Co. v. *Langlade Co.*, 45 N. W., 598.
Callen v. *Junction City* (Kan.), 7 L. R. A., 736.
People v. *Long Island Ry. Co.*, 31 N. E., 873.
State v. *Higgins* (Mo.), 28 S. W., 638.
People v. *Provines*, 34 Cal., 520.
State v. *Ensign*, 56 N. W., 1006.
State v. *District Court*, 22 N. W., 625.
Wheeling Bridge Co. v. *Paull*, 19 S. E., 551.

VII.

The court by its decision erroneously denied to the judgment of the Supreme Court of Indiana that full faith and credit required by Article IV, Section 1, of the Constitution of the United States and the legislation of Congress enacted in pursuance thereof.

Federal Constitution, Art. IV, Sec. 1.
Revised Statutes United States, Sec. 905.
Mills v. *Duryee*, 7 Cranch, 481, 485.
McElmoyle v. *Cohen*, 13 Pet., 312, 324.

Wisconsin v. *Pelican Ins. Co.*, 127 U. S., 265, 291.

Pennington v. *Gibson*, 16 How., 65, 81.

Laing v. *Rigney*, 160 U. S., 531, 542.

ARGUMENT.

I.

Federal courts have no jurisdiction of a suit to set aside a decree of a state court on the ground that such decree is utterly void when tested by an inspection of the record, since in such a case a motion, appeal or bill of review in the court which made the decision is the proper and sufficient remedy.

This proposition is stated in the language of the Circuit Court of Appeals for the Eighth Circuit in *Little Rock Junction Railway* v. *Burke*, 66 F. R., 83.

The bill of complaint herein charges no fraud in obtaining the annexation order, and attempts no impeachment thereof by reason of extrinsic facts, yet prays that the judgment be held utterly null and void, and solicits a perpetual injunction against the exercise of any municipal control over the Forsyth land consequent upon the annexation proceedings. It is clearly an attempted bill of review instituted in another court, and as such must fail for want of jurisdiction in the Circuit Court to entertain such a bill.

Graver v. *Faurot*, 64 F. R., 241.

Marshall v. *Holmes*, 141 U. S., 589.

In the last case cited the authorities in this court are reviewed and distinguished.

It is shown that the Circuit Courts of the United States have jurisdiction, the requisite diversity of citizenship and the amount required by law being present, to determine the rights of the parties, notwithstanding these rights are derived under judicial proceedings in the state court, if the judgment be the result of fraud practiced in the last-named court. The case at bar is clearly not within the exception. The cases distinguished failed in the federal court because in one case it was not alleged that the facts constituting the fraud were not within the knowledge of the party seeking the annulment of the proceedings as affecting the parties or could not have been discovered in time to bring them in some appropriate mode to the attention of the court pronouncing the judgment while the decree was within its control. If the averments contained in complainant's bill as to the motives inducing the City of Hammond to seek the annexation of the lands in question were intended to charge fraud, and thus bring the case within the exception, which we cannot suppose, as they are so clearly insufficient for that purpose, then the complainant must still explain her failure to show why these motives were not urged as a defense in the state court. If they constitute a reason for injunction here, obviously they were a ground of defense there. In any aspect of the case it cannot be considered other than as a continuation of the proceedings in the state court, an effort by a defeated litigant there to obtain a review in the Circuit Court of the United States.

The only possible answer is that the federal courts have jurisdiction to enjoin the enforcement of a judgment or decree where the court is shown to have had no jurisdiction of the parties or the subject-matter. We concede

that in such cases an injunction may issue. There is no dispute that the complainant was present in person and by counsel in all the proceedings in the Indiana courts. There is therefore no failure of jurisdiction as to the person. The failure or lack of jurisdiction must, if asserted, relate to the subject-matter. It is conceded the land was within the State of Indiana and subject to the ordinary process of its courts. There is no contention that it was not properly described in the annexation proceedings. It is not denied that the City of Hammond is duly organized as a city and has the ordinary powers of such municipalities in the State of Indiana. The failure of jurisdiction is founded solely upon a denial of the right of appeal from the board of county commissioners to the Circuit Court and of the right of the Circuit Court to entertain and determine such appeal from legislative action. Its right to entertain such an appeal as to the judicial questions, which are involved in every such case, is conceded. From which this appeal was taken the record is silent. The Circuit Court may have made a mistake. The Court of Appeals presumes it did, and reviews and reverses its action. In this connection the language of this court in *Laing* v. *Rigney*, 160 U. S., 531, 532, quoting *Cornett* v. *Williams*, 20 Wall., 226, 249, seems applicable:

> "The power to review and reverse the decision so made is clearly appellate in its character, and can be exercised only by an appellate tribunal in a proceeding directly had for that purpose. It cannot and ought not to be done by another court, in another case, where the subject is presented incidentally, and a reversal sought in such collateral proceeding. The settled rule of law is that jurisdiction having attached in the original case, everything done within the power of that jurisdiction when collaterally questioned, is to be held conclusive of the rights of the

> parties, unless impeached for fraud. Every intendment is made to support the proceedings. It is regarded as if it were regular in all things and irreversible for error. In the absence of fraud no question can be collaterally entertained as to anything lying within the jurisdictional sphere of the original case. Infinite confusion and mischiefs would ensue if the rule were otherwise. These remarks apply to the order of sale here in question. The county court had power to make it, and did make it. It is presumed to have been properly made, and the question of its propriety was not open to examination upon the trial in the Circuit Court. These propositions are sustained by a long and unbroken line of adjudications in this court. The last one was the case of *McNitt* v. *Turner*, 16 Wall., 366."

In this case the result has been obtained without any attempt to impeach the decree of the state court for fraud, and while conceding its jurisdiction over many questions involved in the annexation proceedings. The lack of jurisdiction is not found from any affirmative fact appearing in the record, but is presumed from the silence of the record. This leads to our second proposition, which is:

II.

The judgment of the state courts having jurisdiction, both of the person and of the property of the appellant, was not subject to collateral attack in the Circuit Court of the United States, and it was error to sustain such an attack in this proceeding.

It is respectfully submitted that the fundamental error of the opinion sought to be reviewed lies in the failure to distinguish between jurisdictional facts and the validity or invalidity of reasons for action after the jurisdiction

had once attached. In its opinion the court says:

> "By the act of May 31, 1879, a right to appeal in the Circuit Court in proceedings before the boards of county commissioners for the annexation of territory to cities and towns against the will of the owner, was expressly given both to the petitioner, and to the owner of any portion of the territory proposed to be annexed; but manifestly it was not intended thereby to take away or modify the discretion with which the act of 1867, section 3660, *supra*, clothes the board, nor to give an appeal from any decision of the board in so far as in the particular instance it was discretionary. But in so far as the board in any such case determines questions of fact, which are essential, either to the jurisdiction of the board in the proceeding or to the right of annexation, as, for instance, the fact and sufficiency of notice, contiguity and ownership of lands, or whether the lands had been platted, its action is of a judicial character, and may properly be made subject to review on appeal. That is to say, if the board should order an annexation of territory which was not contiguous, or of contiguous territory without proper notice of the proceeding having been published, an aggrieved owner of land might appeal; or, on the other hand, if upon proper petition and notice the board should order the annexation of only a part of the land sought to be annexed, or should deny the petition *in toto*, putting its decision expressly and solely upon the ground that the territory was not contiguous, or that the names of the true owners of the land were not given, or that the notice was insufficient, or that the lands had been platted by the owner before the proceedings were commenced, the appeal doubtless might be prosecuted by the petitioner; but in respect to the reasons for annexation, in so far at least as they should be designed and be of a nature only to affect the opinion of the board in respect to the propriety or policy of the proposed annexation, the statute cannot reasonably be said to have been intended to give an appeal, and if so intended, it was to that extent ineffectual, as an attempt to give the courts a legislative power.

> See *Commissioners of Drainage District* v. *Griffin*, 134 Ill., 330, 341. In disposing of any such appeal, the Circuit Court, it would seem clear, must confine itself to questions of a judicial character, and according to the circumstances enter a final order or send the case back to the board of commissioners, but in no case may order annexation unless the record shows that in the opinion of the board, if the proceedings were regular, the prayer of the petition ought to be granted." (Record, pp. 80–81.)

This quotation recognizes that the county board acquired jurisdiction of the persons and the subject-matter in a proceeding in which the petition, description and notice required by section 3659 (Burns' Annotated Statutes, Indiana[1]) had been presented and given. It also recognizes that there are certain facts requiring the decision of the county board which call for the exercise by such board of judicial functions and from which an appeal may properly be allowed to the Circuit Court. It is asserted that the board were authorized to exercise a certain legislative function with reference to the reasons for annexation, and as to the action upon these reasons an appeal cannot be prosecuted, as that would be tantamount to vesting legislative power in the Circuit Court, which is not permissible under the constitution of Indiana. If the board had, so the court says,

> "put its decision expressly and solely upon the ground that the territory was not contiguous, or that the names of the true owners of the land were not given, or that the notice was insufficient, or that the lands had been platted by the owner before the proceedings were commenced, the appeal doubtless might have been prosecuted by the petitioner." (Record, p. 81.)

The question of the jurisdiction of the state circuit court is thus made to depend entirely upon the entry

[1] Appendix, p. 84.

upon the record of the county board or failure to enter thereon the *reasons* for the board's action.

The statute of Indiana requires the county board to keep a record of its proceedings (section 7831, Burns' Annotated Statutes[1]), but does not require it to spread its reasons for action or refusal to act upon the record. So far as we know, the only public body in Indiana of which reasons are required in each case is the Supreme Court of that state.

It must be conceded that circuit courts in Indiana are courts of general jurisdiction. Complete jurisdiction of the county board for all purposes is conceded in the court's opinion. The fact is undisputed that an appeal was taken from the county board to the circuit court, which court entertained the appeal, and proceeded to hear and determine the cause. *Under such circumstances it is confidently asserted that, there being nothing in the record to overturn the presumption, any other tribunal asked to sustain a collateral attack is bound to presume that it appeared to and was found by the circuit court that the county board deemed it advisable to annex the territory in question, and that the reasons were sufficient, but were prevented from granting the prayer of the petition because it was found that the territory was not contiguous, was unplatted, or the notice was defective, or some finding made upon one or more judicial facts which the court says would doubtless give the petitioner the right to appeal.*

The first thing the state circuit court was required to do was to determine its own jurisdiction. It was competent to do this. Under well settled rules its decision upon this point is conclusive and not subject to collateral attack except upon grounds of fraud, or mistake as to the fact of service necessary to acquire jurisdiction. In

[1] Appendix, p. 84.

this case the collateral attack is made by a person who was present in the litigation in the state court in person and by counsel, and the alleged want of jurisdiction is based upon a wholly unwarranted presumption or guess on the part of the Circuit Court of Appeals that the action of the board was based upon what would constitute legislative action rather than judicial reasons. There is not a word or syllable in the bill of the complainant to justify such an inference; in fact, as we have shown elsewhere, the bill was framed upon the theory that the Circuit Court of the United States could review the action of the state court owing to the hardship of the annexation, amounting to abuse, and that the territory was not contiguous to Hammond, through the trick of annexing a strip of land to East Chicago, thereby breaking the contiguity. The lack of jurisdiction through delegation of legislative power was a later discovery not found in any averment of the original bill.

We insist that this search for a reason, which is extrajudicial and outside the record, when it is possible that judicial reason might have existed, does violence to the first principles governing presumptions attending the actions of courts of general jurisdiction, or of courts of limited jurisdiction, where jurisdiction has once attached, as here.

The county board had jurisdiction for all purposes; it was constitutional to grant an appeal to the circuit court as to certain questions involved in the proposed annexation; it is conceded, for the purpose of the argument of this proposition, that the reasons for granting or refusing the annexation are discretionary with the county board and legislative in character, and from its action upon these reasons there could be no appeal, and that the state circuit court would have no jurisdiction to entertain an

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appeal from a decision upon these questions. The circuit court did in this case entertain an appeal. The record in the case is silent as to what was the basis of the action of the county board. In this condition of affairs as against the decisions of the state courts and upon a collateral attack, what presumption must obtain? We answer that the court must presume that the decision of the county board adverse to Hammond rested upon some of the facts of judicial inquiry from a decision upon which an appeal would properly lie. In this answer, we submit, we are sustained by the overwhelming weight of authority. This presumption obtains alike as to the action of courts of limited jurisdiction, when jurisdiction has once attached, and at all times and under all circumstances as to courts of general jurisdiction like the circuit courts of Indiana.

In *Milliken* v. *City of Bloomington*, 72 Ind., 161, 166, a judgment of the county commissioners was held not to be subject to collateral attack. The statute of Indiana gave the board of county commissioners jurisdiction to annex land to a city, where it was not platted. A petition for such purpose alleged that the land was not platted, and an order of annexation was made which was held to be conclusive collaterally that the land was not platted.

In *Loesnitz* v. *Seelinger*, 127 Ind., 422, the board of commissioners had established a gravel road, and apportioned the expense according to the benefit. The land owner was served with notice by the auditor. Under the statute the board then hears objections, and if no sufficient reason is shown against it, approves the report of the viewers and orders an assessment of the amount due from each tract, all of which had been done in that case. The land owner sought to enjoin the collection of an as-

sessment on his land, on the ground that it was illegal. The discretion of the county commissioners was as absolute in that case as in this. The court held:

> "This judgment is as binding upon the parties as the judgment of any other court of competent jurisdiction upon the finding of the court or the verdict of a jury. If any owner of land assessed has any valid objection to the assessment, it is his duty to avail himself of such objection, when brought into court for that purpose; and if he fails to do so the judgment estops him from making such objection in any collateral proceeding like the one before us. *Million* v. *Board*, 89 Ind., 5; *Osborn* v. *Sutton*, 108 Ind., 443, 9 N. E. Rep., 410; *White* v. *Fleming*, 114 Ind., 560, 16 N. E. Rep., 487. It will thus be seen that the authorities applicable to an ordinary tax, levied without notice to the parties to be affected thereby, have no application to this case. As no effort was made to appeal the proceedings resulting in the assessment which the appellant seeks to enjoin, we do not think the question as to whether an appeal does or does not lie from such a proceeding is involved in this case. Nor are we able to perceive how that question can affect the controversy here waged. Assuming that no appeal lies from such proceeding, as contended by the appellant, and it follows that the legislature has made the findings and judgment of the board of commissioners in matters of this kind conclusive. The rule which renders the judgment of a court of competent jurisdiction impervious to collateral attacks applies as well where there is no appeal as to cases where appeals are allowable."

In *Miller* v. *United States*, 11 Wall., 268, 299, a proceeding taken under the act of Congress to confiscate certain corporate stocks, the rule is thus stated:

> "But it is insisted, the District Court did not find that the stocks belonged to a person engaged in the rebellion, or who had given aid or comfort thereto, which, it is said, are made necessary findings by the

seventh section of the act, before a decree of condemnation can be entered.

"This is not an objection to the jurisdiction of the court. We have already shown that it was complete. It is an objection to the regularity of proceeding, and it assumes that the record must show affirmatively that there was no irregularity. It presumes, therefore, against the record. The general rule, however, is, that in courts of record all things are presumed to have been rightly done. In courts of limited jurisdiction, indeed, there is a presumption against jurisdiction, but when that appears they are entitled to the same presumptions in favor of their action as other courts are. The District and Circuit Courts are of limited jurisdiction, but they are not inferior courts, and they are therefore entitled to the same presumptions in their favor. Those presumptions are that the court, having jurisdiction and having entered a judgment, did everything that was necessary to warrant its entry of the judgment. Undoubtedly the contrary may be shown in a court of error, but the burden of showing it is upon him who alleges error."

In *Thornton* v. *Baker*, 15 R. I., 553, the court said:

"Where jurisdiction depends upon the finding of a particular fact, the exercise of jurisdiction implies the finding of that fact."

In *Osburn* v. *Sutton*, 108 Ind., 443, 445, the court said:

"The assumption of authority is an assertion of jurisdiction without any formal statement of the facts essential to give jurisdiction."

In *Jackson* v. *State*, 104 Ind., 516, the same court said:

"Where a court of general jurisdiction assumes jurisdiction, the existence of all facts necessary to confer jurisdiction are presumed to exist."

So it is said in Alabama and Missouri that action in court implies the previous ascertainment of preliminary

jurisdictional facts, and that its decision on those facts can not be called in question collaterally.

Wyatt's Adm. v. *Steele*, 26 Ala., 639, 650; *Vosler* v. *Brock*, 84 Mo., 574, 578.

This Court in *Florentine* v. *Barton*, 2 Wall., 210, 216, speaking of a collateral attack upon an administrator's sale of land, said:

> "In making the order of sale, the court is presumed to have adjudged every question necessary to justify such a decree."

In *Foltz* v. *St. Louis & S. F. Ry. Co.*, 8 C. C. A., 635, the Circuit Court of Appeals for the Eighth Circuit was asked to sustain an injunction obtained by a railroad company restraining the appellant from prosecuting an action of ejectment against the railroad company. The land was situated in Arkansas, and the railroad company was organized under the laws of Missouri. It had purchased the franchises of an Arkansas corporation, and petitioned for condemnation of the lands in question, making the appellant party defendant, and she had removed the cause to the Circuit Court of the United States, where a trial had been had and the damages assessed and paid by the railroad company. Subsequently the appellant sued in ejectment to recover possession of the land covered by the condemnation proceedings. It was held that the right of eminent domain was an attribute of sovereignty, dormant in the State until granted to a public, or quasi public, corporation and that no corporation could exercise the power unless the State had granted to it that right. Sanborn, Judge, announced that it was conceded that under the constitution of the State of Arkansas a foreign corporation, as such, could not have such right. The first question was whether, conceding that the railroad company had no right to condemn land for

public use, the judgment of condemnation was a nullity. It was said upon this point that the court had jurisdiction of the parties and amount in controversy, and that it went without saying that the Circuit Court had the right and power to render a judgment of condemnation in a proper case in favor of a railroad corporation which had the right to exercise the power of eminent domain, and that the question of the legal capacity of the plaintiff to prosecute condemnation proceedings, of the necessity for the condemnation, of the public or private purpose of such condemnation, are questions that the trial court must necessarily hear and determine in every such proceeding. Continuing, the court said:

> "Is every judgment in which the court committed an error in the decision of one of these questions, without the jurisdiction of the court, a nullity, and only those in which it has made no mistake, valid? Jurisdiction of the subject-matter is the power to deal with the general abstract question, to hear the particular facts in any case relating to this question, and to determine whether or not they are sufficient to invoke the exercise of that power. It is not confined to cases in which the particular facts constitute a good cause of action, but it includes every issue within the scope of the general power vested in the court, by the law of its organization, to deal with the abstract question. Nor is this jurisdiction limited to making correct decisions. It empowers the court to determine every issue within the scope of its authority according to its own view of the law and the evidence, whether its decision is right or wrong, and every judgment or decision so rendered is final and conclusive upon the parties to it, unless reversed by writ of error or appeal, or impeached for fraud. *Insley* v. *U. S.*, 14 Sup. Ct., 158; *Cornett* v. *Williams*, 20 Wall., 226; *Des Moines Nav. and R. Co.* v. *Iowa Homestead Co.*, 123 U. S., 552, 8 Sup. Ct., 217; *In re Sawyer*, 124 U. S., 200, 221, 8 Sup. Ct., 482; *Skillerns* v. *May's Ex'rs.*, 6 Cranch, 267; *Mc-*

Cormick v. *Sullivant*, 10 Wheat., 192; *Hunt* v. *Hunt*, 72 N. Y., 217; *Colton* v. *Beardsley*, 38 Barb., 30, 52; *Otis* v. *The Rio Grande*, 1 Woods, 279, Fed. Cas. No. 10,613; *Hamilton* v. *Railroad Co.*, 1 Md. Ch., 107; *Evans* v. *Haefner*, 29 Mo., 141, 147; *State* v. *Weatherby*, 45 Mo., 17; *Rosenheim* v. *Hartsock*, 90 Mo., 357, 365, 2 S. W., 473; *State* v. *Southern Ry. Co.*, 100 Mo., 59, 13 S. W., 398; *Hope* v. *Blair*, 105 Mo., 85, 93, 16 S. W., 595; *Musick* v. *Railway Co.*, 114 Mo., 309, 315, 21 S. W., 491. Wherever the right and the duty of the court to exercise its jurisdiction depends upon the decision of a question it is invested with power to hear and determine, there its judgment, right or wrong, is impregnable to collateral attack, unless impeached for fraud. In *Colton* v. *Beardsley*, 38 Barb., 30, 51, 52, the New York court said:

"'When the jurisdiction of an inferior tribunal depends upon a fact which such tribunal is required to ascertain and determine, such decision is final until reversed in a direct proceeding for that purpose. The test of jurisdiction in such cases is whether the tribunal has power to enter upon the inquiry, and not whether its conclusion in the course of it is right or wrong.'

"In *Des Moines Nav. and R. Co.* v. *Iowa Homestead Co.*, *supra*, a judgment of the United States Circuit Court was collaterally attacked because it appeared on its face that the plaintiff and some of the defendants were citizens of Iowa, and hence that that court appeared to have no jurisdiction of the action. But Chief Justice Waite, delivering the opinion of the Supreme Court, said:

"'Whether in such a case, the suit could be removed, was a question for the Circuit Court to decide when it was called on to take jurisdiction. If it kept the case when it ought to have been remanded, or if it proceeded to adjudicate upon matters in dispute between two citizens of Iowa when it ought to have confined itself to those between citizens of Iowa and citizens of New York, its final decree in the suit could have been reversed on appeal, as erroneous, but the decree would not have been a nullity. To

determine whether the suit was removable in whole or in part, or not, was certainly within the power of the Circuit Court. The decision of that question was the exercise and the rightful exercise of jurisdiction, no matter whether in favor of or against taking the cause.'

"In *Evans* v. *Haefner* and *Hamilton* v. *Railroad Co.*, *supra*, judgments of condemnation were collaterally attacked on the ground that the uses for which the lands were condemned were private and not public uses. It goes without saying that private property cannot be condemned for private use; but the courts of Maryland and Missouri held that the judgments were conclusive of this question on a collateral attack."

The portion of the decision not quoted is devoted to an examination of the distinctions existing in the cases as to when, in collateral attack, one court may hold the prior decision of another court void for want of jurisdiction. The cases of *In re Sawyer*, 124 U. S., 200; *Whitehead* v. *Railroad Co.*, 28 Ark., 460; *Lessee of Hickey* v. *Stewart*, 3 How., 751; *Bigelow* v. *Forrest*, 9 Wall., 339; *Ex parte Lange*, 18 Wall, 163; *Day* v. *Micon*, 18 Wall., 156, and *U. S.* v. *Walker*, 109 U. S., 258, are cited and examined, and it is declared that in all these cases it expressly appeared that the court was absolutely without jurisdiction to hear or determine matters attempted to be decided. A summary of the cases is given in the opinion, and such summary shows the absolute want of jurisdiction on the subject-matter under any circumstances to be the basis of the decisions.

It is submitted that these principles and decisions rule the case at bar. It is conceded by the Circuit Court of Appeals that jurisdiction upon appeal does properly exist in the circuit court of Indiana to review proceedings for the annexation of contiguous unplatted lands to cities. That is, if the commissioners, after the exercise of their

alleged discretion, approve the reasons and declare the annexation desirable, but find, as a matter of fact, either (1) that a petition has not been presented, or (2) that sufficient notice has not been published, or (3) that the land is not contiguous, or (4) that it is not unplatted land, or (5) that the owners had given their consent—in any or all of these instances the petition should be denied, and an appeal would lie to the circuit court from the decision, where, if that court determined the question of fact, which was the basis of the refusal, in the opposite way, it could decree the annexation and enforce it. Assuming that the Supreme Court of Indiana had declared that portion of the law which gave an appeal from the refusal of the board of commissioners to order an annexation upon the exercise of their discretion unconstitutional and void, and that appeal would lie only from the determination of some question of jurisdictional fact, yet it is obvious that upon appeal in any annexation proceeding the first question which the circuit court would have to decide would be whether the appeal was from the question of jurisdictional fact or from a question of discretion. If the circuit court sustained the appeal, and the record did not contain a detailed statement or finding on the subject, it would be upon collateral attack presumed beyond controversy, under the principles of the decisions, that the circuit court had passed upon the question and had decided that the action of the commissioners was based upon their adverse finding of some jurisdictional fact and not upon their discretion. Such a determination is precisely analogous to the determination in the land decision by the federal court that the railroad company had the capacity to condemn, and a decision which must have assumed such capacity could not be collaterally questioned by a party to the suit. In the present case neither the record

in the Supreme Court of Indiana nor the record in the Circuit Court of Appeals discloses or intimates that the board of county commissioners as a matter of discretion refused the annexation. On the contrary, the decision and first opinion of the Supreme Court of Indiana were based principally upon the question as to whether the territory sought to be annexed was contiguous unplatted land, and this was a question of jurisdictional fact and not a question of discretionary or legislative power, and so admitted in the opinion of the Circuit Court of Appeals.

Elder v. *Richmond Gold & Silver Min. Co.*, 7 C. C. A., 354, and *Bigelow* v. *Chatterton*, 2 C. C. A., 402, are both in point upon this subject. The first holds that jurisdiction in attachment is not assailable upon collateral attack for mere irregularities or errors in the proceeding, and the latter, that a judgment in an attachment suit is not invalidated by the fact that the record failed to show the notice of the filing of the answer given in conformity with the requirements of the code, *as the presumption is that the court rightly decided that such requirements were complied with, and that is conclusive against collateral attack.*

Upon this question the remarks of the court in the first case (page 357) are instructive:

> "The court had jurisdiction of the parties and the subject-matter, and it had the power, and it was its duty, to hear and decide every question of fact and law that arose in the progress of the case, until it was finally disposed of. It was its duty to inquire and decide whether the requirements of the practice act, in the particular mentioned, had been observed. The presumption is that it did inquire, and that it decided the question rightly, and this presumption is of conclusive force as against a collateral attack upon the judgment. But if this, or any other question of law or fact which arose in the progress of the case,

was erroneously decided, the jurisdiction of the court and the validity of its judgment would not be affected thereby. An erroneous decision does not divest a court of its jurisdiction over the case. *Elliott* v. *Peirsol*, 1 Pet., 328, 340. If it commits errors, they can only be corrected by appropriate appellate procedure in a court which, by law, can review the decision. *Bronson* v. *Schulten*, 104 U. S. 410. But neither this court nor the Circuit Court is invested with appellate or supervisory jurisdiction over the state courts, nor can either reverse, vacate or modify their judgments, in cases in which they had jurisdiction of the parties and the subject-matter. *Randall* v. *Howard*, 2 Black, 585; *Nougue* v. *Clapp*, 101 U. S., 551; *Central Trust Co.* v. *St. Louis, A. & T. Ry. Co.*, 40 Fed. Rep., 426. The judgment of June 10, 1882, even if it was erroneous, was not void, and has the same force and effect as if no error had been committed in its rendition."

In *Donham* v. *Springfield Hardware Co.*, 10 C. C. A., 294, the question was whether a suit in which a judgment had been recovered for less than $2,000 had been taken before or after the 23rd day of March, 1887. The complaint was filed on the 23rd day of February, 1887, and a summons placed in the hands of the marshal on the 23rd day of March, 1887, and afterwards served. It was insisted that the judgment was void for lack of jurisdiction, and the bill was brought for the express purpose of having it declared null and void. After announcing that a court having jurisdiction of the person was entitled to, and did, decide the question as to whether the suit was begun before or after the new act was in force, and that its decision thereon was reviewable only upon appeal or by writ of error, the rule was stated as follows:

"Until corrected in this manner, the judgment is as valid and binding as if the record disclosed on its face a cause of action clearly within the jurisdiction of the court. It is well settled that the judgments

> of the United States courts rendered upon personal service on the defendant are binding, until reversed, though no jurisdiction be shown on the record. *Skirving* v. *Insurance Co.*, 8 C. C. A., 241; *Foltz* v. *Railway Co.*, 8 C. C. A., 635; *Elder* v. *Mining Co.*, 7 C. C. A., 354."

Upon the questions of *res adjudicata*, collateral attack and presumptions this court has spoken frequently and in very clear terms.

In *Evers* v. *Watson*, 156 U. S., 527, a bill was brought to set aside a decree entered in the United States Circuit Court on the ground that the court had no jurisdiction. It appeared that the bill was filed in the chancery court of De Soto County, Mississippi, by a citizen of Illinois against various defendants, one of whom was a citizen of Illinois, had been removed to the United States Circuit Court, and after final hearing a decree entered therein. In passing upon the point as to whether this rendered the decree void, there being nothing in the record to show citizenship, the court said:

> "Even upon the theory of the plaintiffs, to authorize the court to hold the decree in that case void in a collateral proceeding, it was necessary to show beyond any controversy that, upon the record, the court could not have had jurisdiction."

And, continuing, the court said:

> "But we do not wish to be understood as holding that, even if jurisdiction had not been apparent upon the record, advantage could be taken of it after a final decree, and in a collateral proceeding."

Skillern's Executors v. *May's Executors*, 6 Cranch, 267; *McCormick* v. *Sullivant*, 10 Wheat., 192; *Ex parte Watkins*, 3 Pet., 193; *Kennedy* v. *Georgia State Bank*, 8 How., 586; *Des Moines Navigation Co.* v. *Iowa Homestead Co.*, 123 U. S., 552, and *Dowell* v. *Applegate*, 152

U. S., 327, are cited in support of these propositions.

In *Dowell* v. *Applegate*, 152 U. S., 327, it was urged that a prior decision in the United States Circuit Court for the District of Oregon was a nullity because all of the parties were citizens of Oregon. The question was whether the federal court had erred in assuming or retaining jurisdiction of the suit upon the ground that there was a federal question involved. An examination of various prior cases was had, and, as the result, the doctrine was declared (p. 340):

> "These cases establish the doctrine that, although the presumption in every stage of a cause in a Circuit Court of the United States is that the court is without jurisdiction unless the contrary affirmatively appears from the record, *Bors* v. *Preston*, 111 U. S., 255, and the authorities there cited, yet if such jurisdiction does not so appear, the judgment or final decree cannot, for that reason, be collaterally attacked or treated as a nullity."

Des Moines Navigation and Railroad Company v. *Iowa Homestead Company*, 123 U. S., 552, came by writ of error from the Supreme Court of the State of Iowa to this court. The question was whether a prior decree affirmed by the Supreme Court in *Homestead Co.* v. *Valley Railroad Company*, 17 Wall., 153, was *res adjudicata*. The Iowa court refused to allow this effect to the decree invoked.

The point having been raised that the United States courts, both Circuit and Supreme, had no jurisdiction in the prior litigation, because of lack of proper citizenship, it was said (p. 556):

> "The precise question we have now to determine is, whether the adjudication by this court, under such circumstances, of the matters then and now at issue between the Homestead Company and the Navigation and Railroad Company was absolutely void

for want of jurisdiction. The point is not whether it was error in the Circuit Court to take jurisdiction of the suit, or of so much of it as related to the Navigation and Railroad Company, originally, but as to the binding effect of the decree of this court so long as it remains in force, and is not judicially annulled, vacated, or set aside.

"It was decided in *Hancock* v. *Holbrook*, 119 U. S., 586, that if a suit, in which there was but one controversy, between a citizen of the state in which the suit was brought and a citizen of another state, was removed from a state court to a Circuit Court of the United States on the ground of 'prejudice or local influence,' under sub-section 3 of Section 639 of the Revised Statutes, which is the re-enactment, in the revision of the act of March 2, 1867, c. 196, 14 Stat., 558, in force when the proceedings now under consideration were had, it was not error in the Circuit Court to remand the suit if all the defendants were not citizens of different states from all the plaintiffs; but here the question is, whether, if all the parties were actually before the Circuit Court, the decree of this court on appeal is absolutely void, if it appears on the face of the record that some of the defendants who did not join in the petition for removal were citizens of the same state with the plaintiff.

"It was settled by this court at a very early day, that, although the judgments and decrees of the Circuit Courts might be erroneous, if the records failed to show the facts on which the jurisdiction of the court rested, such as that the plaintiffs were citizens of different states from the defendants, yet that they were not nullities, and would bind the parties until reversed or otherwise set aside. In *Skillern's Executors* v. *May's Executors*, 6 Cranch, 267, the Circuit Court had taken jurisdiction of a suit and rendered a decree. That decree was reversed by this court on appeal, and the cause remanded with directions to proceed in a particular way. When the case got back it was discovered that the cause was 'not within the jurisdiction of the court,' and the judges of the Circuit Court certified to this court

that they were opposed in opinion on the question whether it could be dismissed for want of jurisdiction after this court had acted thereon. To that question the following answer was certified back: 'It appearing that the merits of the cause had been finally decided in this court, and that its mandate required only the execution of its decree, it is the opinion of this court that the Circuit Court is bound to carry that decree into execution, although the jurisdiction of that court be not alleged in the pleadings.' That was in 1810. In 1825, *McCormick* v. *Sullivant*, 10 Wheat., 192, was decided by this court. There a decree in a former suit was pleaded in bar of the action. To this a replication was filed, alleging that the proceedings in the former suit were *coram non judice*, the record not showing that the complainants and defendants in that suit were citizens of different states; but this court held on appeal that 'the courts of the United States are courts of *limited*, but not of *inferior*, jurisdiction. If the jurisdiction be not alleged in the proceedings, their judgments and decrees may be reversed for that cause on a writ of error or appeal; but until reversed they are conclusive between the parties and their privies.' 'But they are not nullities.' There has never been any departure from this rule."

Upon the question of removability the court said (p. 559):

"The decision of that question was the exercise and the rightful exercise of jurisdiction, no matter whether in favor of or against taking the cause. Whether its decision was right, in this or in any other respect, was to be finally determined by this court on appeal. As the Circuit Court entertained the suit, and this court, on appeal, impliedly recognized its right to do so, and proceeded to dispose of the case finally on its merits, certainly our decree can not, in the light of prior adjudications on the same general question, be deemed a nullity. It was, at the time of the trial in the present case in the court below, a valid and subsisting prior adjudication of

the matters in controversy, binding on these parties, and a bar to this action."

In *Skirving* v. *Life Insurance Co.*, 59 F. R., 742, an attempt was made by a tax-payer to enjoin the insurance company from enforcing a judgment at law against a certain school district. Judgment had been obtained against the school district in the United States Circuit Court, but did not contain sufficient to show jurisdiction. The rule in the cases cited above was applied. It was held that while the failure to show jurisdictional facts might be sufficient to justify reversal for error in a direct proceeding, it did not make the judgment void so that it could be attacked collaterally.

So in *Pullman's Palace Car Co.* v. *Washburn*, 66 F. R., 790, it was ruled that a judgment rendered in a federal court in an action removed from a state court could not be collaterally attacked for want of proper jurisdictional allegations in the petition for removal. An elaborate review of the authorities was made by Judge Putnam in this last case, and the rule was declared to be as follows (p. 797):

> "Except in extreme cases, as where a judgment was beyond the scope of the powers of the court, or no jurisdiction was obtained over the persons, or the *res*, or there was fraud or collusion, the decisions of the Supreme Court are numerous that it cannot be attacked collaterally for mere errors. From them we cite *Huff* v. *Hutchinson*, 14 How., 586, 588; *Cooper* v. *Reynolds*, 10 Wall., 308, 315; *Michaels* v. *Post*, 21 Wall., 398, 428; *Colt* v. *Colt*, 111 U. S., 566, 4 Sup. Ct., 553; *Mellen* v. *Iron Works*, 131 U. S., 352, 367, 9 Sup. Ct., 781; *New Orleans* v. *Gain's Admr.*, 138 U. S., 595, 607, 11 Sup. Ct., 428; *Insley* v. *U. S.*, 150 U. S., 512, 515, 14 Sup. Ct., 158."

But why multiply authorities. There is no conflict as to

courts of general jurisdiction; the conflict which has arisen has been with reference to the presumptions attending the action of courts of special and limited jurisdiction, with which questions the case at bar has no relations, as the jurisdiction of the county board is conceded.

It is to be observed that the sufficiency or insufficiency of the reasons have nothing to do with the jurisdiction. The filing of a petition with good or bad reasons, after compliance with the statute, confers jurisdiction. It is analogous to a bad declaration upon which summons has issued. No one could contend that because the declaration was bad, therefore the person who had appeared and answered was entitled to collaterally dispute the jurisdiction. It is true the appeal compels a trial in the Circuit Court, *de novo;* but upon the appeal only judicial facts are to be tried. Such an appeal required the Circuit Court at once to pass upon the question of jurisdiction. Finding a proper petition and notice, it proceeded to hear and determine the issue raised by the objectors. Having determined that it had jurisdiction, that fact cannot be disputed by a party to the record, who appeared and availed himself of his day in court, except upon the ground of fraud.

The *contents* of the petition not being a test of jurisdiction, nor even the action of the county board thereon, but the *fact* of a petition, we have the Grusenmeyer case (76 Ind., 549) as a direct authority that the judgment is not subject to collateral attack.

It is confidently submitted that it was not proper for the federal court upon collateral attack to search for the reasons determining the action of the county board, but for the state circuit court, and the fact that it took jurisdiction is a final adjudication that the county board acted upon reviewable reasons.

III.

The validity of the annexation as between the parties to this record became res judicata by the decisions of the state courts, and it is error to treat it herein as res integra.

The complainant had experimented with every possible court in Indiana before she sought relief in the federal court. From the board of county commissioners she followed the cause to the Circuit Court of Lake County, from there to the Circuit Court of Porter County, from there to the Supreme Court of Indiana, and after its decision she prosecuted her petition for a rehearing. Defeated in these courts, she turned to the Circuit Court of the United States for relief, asking it to declare the entire proceedings in which she had participated null and void. The record shows that she was unable in support of this demand to submit to the federal court a single fact or circumstance that not only might not have been considered by the state courts, but was not so considered. The Circuit Court declined to entertain such a bill. The Circuit Court of Appeals has reversed this action upon a guess as to the reasons which led the county board to refuse the petition for annexation, a guess, as we have sought to show, that flies in the face of all the authorities upon the subject of the presumptions attending judicial action.

Assuming, as does the Circuit Court of Appeals, that in a proceeding to annex territory to cities there are both legislative and judicial questions, and that in the protection of the rights of the citizen the courts may rightly be appealed to as to the existence of certain facts; and that the Porter Circuit Court, a court of general jurisdiction,

took jurisdiction of such an appeal, which it could not have done unless the appeal was for some of the judicial reasons stated, and that the cause has from thence proceeded to a final determination so far as the Indiana courts are concerned, we submit that the controversy between the complainant and the City of Hammond has become *res adjudicata* and was not the proper subject of inquiry in the federal courts in the absence of averments showing fraud or want of jurisdiction. This proposition has been discussed in some of its phases under the earlier divisions of this argument. It is referred to here again only because, adopting the theory of the Circuit Court of Appeals as to the proper division between legislative and judicial action (which we only do for the sake of argument), it is apparent that it was essential to action by the Circuit Court that annexation by the county board must have been refused upon judicial reasons. It appears the state circuit court did act. The language of Mr. Justice Strong in *Block* v. *Commissioners*, 99 U. S., 686, is thus applicable:

> "Now, that a judgment in a suit between two parties is conclusive in any other suit between them, or their privies, of every matter that was decided therein, and that was essential to the decision made, is a doctrine too familiar to need citation of authorities for its support. A few cases go further, and rule that it is conclusive of matters incidentally cognizable, if they were in fact decided. To this we do not assent. But it is certain that a judgment of a court of competent jurisdiction is everywhere conclusive evidence of every fact upon which it must necessarily have been founded."

In *Wilson* v. *Deen*, 121 U. S., 525, 532, 7 Sup. Ct. Rep., 1004, Mr. Justice Field restates the principle thus:

> "In *Cromwell* v. *County of Sac*, 94 U. S., 351, we considered at much length the operation of a

judgment as a bar against the prosecution of a second action upon the same demand, and as an estoppel upon the question litigated and determined in another action between the same parties upon a different demand; and we held, following in this respect a long series of decisions, that in the former case the judgment, if rendered upon the merits, is an absolute bar to a subsequent action, a finality to the demand in controversy, concluding parties and those in privity with them; and that in the latter case—that is, where the second action between the same parties is upon a different demand—the judgment in the first action operates as an estoppel as to those matters in issue, or points controverted, upon the determination of which the finding or verdict was rendered."

The rule thus stated has been reiterated in *Nesbit* v. *Independent Dist.*, 144 U. S., 610, 618, 12 Sup. Ct. Rep., 746; *Railroad Co.* v. *Alsbrook*, 146 U. S., 279, 302, 13 Sup. Ct. Rep., 72; *McComb* v. *Frink*, 149 U. S., 629, 641, 13 Sup. Ct. Rep., 993.

In *Green* v. *Bogue*, 158 U. S., 478, an attempt was made to avoid a sale of land under decree in a proceeding in the circuit court of Illinois, in which the parties were all present. It appeared that before the bill was filed in the United States Circuit Court, a decree had been entered in the circuit court of Illinois confirming the sale and denying the petition of subsequent complainants in the United States Circuit Court to have the sale set aside. This was pleaded as a bar. The judgment was subsequently affirmed by the Illinois Supreme Court pending the appeal from the United States Circuit decision to this court. It was held that the form of the proceedings made no difference, and that because the relief asked in the state court was to set aside the sale, and the relief sought in the federal court was to enforce a trust as to a portion of the

purchase money, leaving the sale to stand, made no difference, and that the decree of the state court was an absolute adjudication and bar.

In *Last Chance Mining Company* v. *Tyler Mining Company*, 157 U. S., 683, it appeared that by a prior suit in the district court of the state the location of a triangular piece of ground under which the vein of mineral was had been already determined, and it was held that the judgment of the court being in all respects regular and conclusive as to the particular ground in controversy, was binding as to every fact necessarily determined by it, including the question of the prior location; and that findings of fact in such cases, even where no statute provides for making them, are a declaration by the court of the matters which they determine, and are conclusive in subsequent controversies between the parties; and that a judgment by default is just as conclusive, as an adjudication between the parties of whatever is essential to support the judgment, as one rendered after answer and contest; and in such case, facts are not open to further controversy, if they are necessarily at variance with the judgment on the pleadings.

Such are the principles governing *res adjudicata* and estoppel resulting therefrom, announced by the federal courts. It will be seen from an examination of the cases that the decision of a competent tribunal relative to the subject-matter of the litigation, or any fundamental part thereof, which was adjudicated between the parties, either in their individual or representative capacity, is a complete determination of litigation on that subject, and this, whether the decision was made by a state or a federal tribunal, whether made before or during the pendency of the litigation in which it is set up.

It remains to examine the question as to whether, after

another court of concurrent jurisdiction has decided expressly that it has jurisdiction of the subject-matter and of the parties, the same parties can, in another tribunal, subsequently avoid the effect of the prior decision by raising and relitigating the question of jurisdiction and wiping out the prior decision, because jurisdiction to adjudicate *might* not have existed under some possible contingencies. It is a cardinal principle of law governing the effect of final decrees that all presumptions are indulged in favor of regularity and jurisdiction, and that if jurisdiction could under any possibility have obtained, even though not apparent on the record, it will be conclusively presumed, unless the contrary expressly appear.

In addition to the cases already cited we venture to add the following:

Foster v. *Givens*, 14 C. C. A., 625, was a decision of the Circuit Court of Appeals of the Sixth Circuit. Foster and others sued in ejectment, and introduced in evidence a decree under which the land they claimed was sold. The first objection urged was to the jurisdiction of the court entering the decree of sale over the different parcels of land, as different parts of it lay in other counties, but the court said:

> "The circuit courts of Kentucky, being courts of general common-law and equity jurisdiction, and not courts of special and limited jurisdiction, are within the well-known rule which presumes, upon a collateral attack, that a jurisdiction actually exercised by such a court was rightfully exercised, until the contrary clearly appears. Such courts of record are competent to decide upon their own jurisdiction, and to exercise it to final judgment. This applies to both jurisdiction over the subject-matter and over the persons of the defendants, and when a judgment of such a court is collaterally brought in question, every

> reasonable presumption will be indulged in favor of the rightful exercise of jurisdiction, and they are not required to spread upon their records the facts and evidences upon which their jurisdiction was rested. Freem. Judgm., Section 122; *Pope* v. *Harrison*, 16 Lea, 90; *Grignon's Lessee* v. *Astor*, 2 How., 337."

In *Galpin* v. *Page*, 18 Wall., 366, in which case Mr. Justice Field, in speaking for the court concerning the presumptions in favor of the rightful exercise of jurisdiction by the courts of general, and not limited, powers, declared that the jurisdiction to give the judgment a court rendered would be presumed until the contrary appeared, and that the presumption embraced jurisdiction not only of the cause or subject-matter of the action in which the judgment was given, but of the parties also.

And, again, on page 629, the court said, in speaking of the same subject:

> "Good pleading undoubtedly required that the pleadings should state a case within the jurisdiction. But if no averment appears showing defect of jurisdiction, it will be presumed, upon a collateral attack, that the subject-matter of the suit was within the territorial jurisdiction of the court. 'A court of general jurisdiction, proceeding within the general scope of its powers, is presumed, in an equitable proceeding, to have had jurisdiction in the case until the contrary appears. This presumption extends to all jurisdictional facts concerning which the record is silent.' The record in a suit for foreclosure of a mortgage need not show that the land mortgaged lies in the county. In the absence of an averment to the contrary, this will be presumed until the contrary is shown."

The application of these remarks to the case at bar is this: It is conceded by the Circuit Court of Appeals, in its opinion, that the board of county commissioners had a proper statutory jurisdiction upon the subject of annex-

ation. It is also admitted that as to all the jurisdictional facts, namely, presentation of petition, the sufficiency of notice, the contiguity of the lands, the fact as to whether they were platted or not platted of record, the board of county commissioners acted as a judicial body, and their decision on any or all of these points could be properly appealed to the circuit court, but it is asserted that no appeal could be taken from the exercise of the discretionary power of the county board. The Circuit Court of Appeals then presumes the appeal to have been taken from a non-appealable phase of the case when there is absolutely nothing upon the record to show that such was the fact, and refuses to apply the well-established rule that all presumptions in favor of the jurisdiction of a court of general power shall be indulged, and, where the record is silent, jurisdiction must be presumed, but reverses the rule, and out of its own imagination injects into the record the pretended fact that the appeal was taken from a discretionary finding of the board of county commissioners, to wit, that *the reasons were* not sufficient. Nor can it be urged that the general rule does not obtain, because the board of county commissioners was a specially created tribunal of limited powers, because the objection is not to the jurisdiction of the board of county commissioners, but to the jurisdiction of the circuit court on appeal. The circuit court is a court of general jurisdiction, having original, exclusive jurisdiction in all cases at law and equity whatever, and having such appellate jurisdiction as may be conferred by law, and having jurisdiction of all other causes, matters and proceedings, where exclusive jurisdiction thereof is not conferred by law upon some other court, board or officer.[1]

Under this statute, it has been decided that when ap-

[1] Appendix, p. 85.

peals are authorized from inferior tribunals, and no express direction is given as to the court to which the appeal lies, the circuit court has jurisdiction. *Hamilton* v. *Fort Wayne*, 73 Ind., 1.

Moreover, it is the court of general appeal from all decisions of the board of county commissioners.

> "Any person or corporation feeling aggrieved with any decision of the board of county commissioners, made as hereinbefore provided, may appeal to the Circuit or Superior Court of such county, as provided by law." Section 7856, Burns' Stat. Ann.

From any decision of such commissioners an appeal is provided to the circuit court by any person aggrieved.[1] The circuit court may make a final determination of the proceeding thus appealed, and cause the same to be executed, or may send the same down to such board with an order how to proceed, and may require such board to comply with the final determination made by such court in the premises. Thus it will be seen that the circuit courts of Indiana are courts of general original jurisdiction concerning whose action every presumption must be indulged. Having determined that it had jurisdiction, and that determination having been affirmed by the Supreme Court, it is submitted that it is a clear violation of the principles attending completed litigation, as well as of the principles of comity between the state and the federal courts, to permit the latter to nullify the result reached through their injunction process.

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[1] Appendix, pp. 85, 86.

IV.

The decision of the Supreme Court of Indiana establishing the validity of the annexation, and construing the statutes and constitution of that state, should have been followed in the federal court, and the court erred in refusing to be bound thereby.

This suit for injunction was begun April 30, 1895. The original opinion establishing the validity of the annexation was filed in the Supreme Court of Indiana, April 11, 1895 (40 N. E. R., 267). The opinion upon the petition for a rehearing was filed November 7, 1895 (41 N. E. R., 950). Judge Baker's decision was filed July 3, 1895 (68 F. R., 774).

Admitting to the full extent the rule stated in the case of *Burgess* v. *Seligman*, 107 U. S., 20, cited at length in the opinion, we respectfully submit that it is not applicable to the case at bar. The City of Hammond is a political agency of the state; the questions of her government, limits, or methods of extending the same, are questions of a local or state character, having nothing to do with any law of Congress, the constitution of the United States, or general questions of contract or commercial law. When the complainant acquired property in Indiana she consented to hold it subject to the laws of that state, constitutionally enacted. She has not parted with any money on the faith of any particular law, or construction of the laws, relating to the annexation of contiguous territory to cities. These facts distinguish this case from *Burgess* v. *Seligman*, *supra*. We adopt the language of the Circuit Court (S. D. Ohio) in *Western Union Tel. Co.* v. *Poe*, 64 F. R., 9, 12, Taft, Judge:

"When the issue in a Circuit Court of the United

States concerns transactions between individuals entered into on the faith of a particular construction of a state law or constitution, and the Circuit Court enters a decree sustaining the validity of such construction, all before the supreme court of the state has expressed any opinion on the point, the Supreme Court of the United States will not reverse the decree of the court below, if it otherwise approves it, simply because meantime the state court has given the law or the constitution a different construction. This was the principle in *Burgess* v. *Seligman*, 107 U. S., 32, 2 Sup. Ct., 10. Nor, when transactions have been entered into by individuals on the faith of a certain construction which has been given to a state statute or constitution by the Supreme Court of the United States, will that court change its opinion because, subsequent to the transactions involved, the state supreme court has taken a different view. This was the case in *Carroll Co.* v. *Smith*, 111 U. S., 556. Nor, when different constructions have been given to a statute or a constitution by a state court, are the federal courts bound to follow the later decisions if thereby contract rights which accrued under earlier rulings will be injuriously affected. This principle is established in *Douglas* v. *County of Pike*, 101 U. S., 677; *Supervisors* v. *U. S.*, 18 Wall., 71, and *Rowan* v. *Runnels*, 5 How., 134. But the case at bar calls for the application of no such principle. Here is not involved the validity of construction of a law on the faith of which individuals have made contracts, advanced money or incurred liability. We have here simply a tax law fixing the obligation of artificial persons of a certain class to contribute to the support of the state. In respect of such a law, it would be anomalous and absurd to have a diversity of rulings between the state and the federal courts. The intolerable result of such a diversity would be that companies who could invoke the jurisdiction of the federal courts would not pay the tax, while all those who could not invoke that jurisdiction would be compelled to pay it. There is nothing in the decisions of the Supreme Court of the United States, which gives the slightest warrant for

supposing that, in the case of a state tax law, it would not follow the decision of the state supreme court, whenever rendered, and however divergent from its own views the conclusion, provided no federal question was involved. In the State Railroad Tax Cases, 92 U. S., 575, 617, 618, the Circuit Court of the United States held that a tax law of Illinois was invalid, because in violation of the state constitution. Before the cases reached the Supreme Court of the United States, on appeal, the supreme court of the state decided that the law was valid. The Circuit Court decree was accordingly reversed. It is true that in that case the Supreme Court of the United States concurred with the state court on the merits, but Justice Miller used this language:

"'But if for no other reason, we should reverse the decrees of the Circuit Court in these cases because the same questions involving the considerations urged upon us here have been decided by the Supreme Court of the State of Illinois, in a manner which leads to the reversal of these. . . . As the whole matter, then, concerns the validity of a state law, as affected by the constitution of the state, that question and the other one of the true construction of that statute belong to the class of questions in regard to which this court still holds, with some few exceptions, that the decisions of the state courts are to be accepted as the rule of decision for the federal courts. It is, nevertheless, a satisfaction that our judgment concurs with that of the state court, and leads us to the same conclusions.'

"In *Bauserman* v. *Blunt*, 147 U. S., 647; 13 Sup. Ct., 466; *Moores* v. *Bank*, 104 U. S., 625, and *Green* v. *Neal's Lessee*, 6 Pet., 291, the Supreme Court reversed the ruling of the Circuit Court as to the effect of a state statute of limitation, solely because, after the decision by the Circuit Court, the supreme court of the state had given the statute a different construction. In *Stutsman Co.* v. *Wallace*, 142 U. S., 293, 12 Sup. Ct., 227, a case involving the construction of the tax laws of the Territory of Dakota, the supreme court of the territory took one view. The case was carried to the

> Supreme Court of the United States for review. Meantime the territory had become a state, and the State Supreme Court, in another case, differed with the ruling of the territorial court. The federal Supreme Court thereupon reversed the judgment of the territorial court, in deference to the decision of the state court. See, also, *Suydam* v. *Williams*, 24 How., 427, and *Fairfield* v. *County of Gallatin*, 100 U. S., 47. For the reasons given, the motions for a rehearing must be granted."

This distinction is affirmed in the Circuit Court of Appeals (Sixth Circuit), *Sandford* v. *Poe*, 69 F. R., 546, 548, by Lurton, Judge, in the following language:

> "The courts of Ohio had not theretofore passed upon the question, and the Circuit Court could not escape the duty of determining for itself the true meaning and construction of the constitution of Ohio, so far as involved by the mode of assessment provided by the Nichol's law. Before a final decree had been rendered the Supreme Court of Ohio, in a case involving the validity of the same law, announced a contrary opinion, and held the Nichols law, as construed by the same court, an entirely valid law, so far as it was supposed to be affected by the state constitution. Under the circumstances of this case we think the duty of the Circuit Court was to accept the opinion of the Ohio court as conclusive and to render judgment accordingly. The case before it involved no rights or contracts between individuals which had been entered into upon the faith of earlier and conflicting decision of either the courts of the United States or of the state, and therefore presented no question such as arose in *Burgess* v. *Seligman*, 107 U. S., 32, 2 Sup. Ct., 10, or *Carroll Co.* v. *Smith*, 111 U. S., 556, 4 Sup. Ct., 539, or *Douglass* v. *Pike Co.*, 101 U. S., 667, or *Rowan* v. *Runnels*, 5 How., 134. Where the construction or validity of a state statute does not involve rights acquired upon the faith of earlier or conflicting decisions, it is the clear duty of federal courts to accept and adopt the decisions of the highest court of a

> state in respect to the construction and conformity of state laws to the constitution of the state. The decision of such questions properly belongs to the highest courts of the state. We entirely concur with the opinion of the Circuit Judge upon this question."

And the court then adopts and quotes at length the language of the Circuit Judge as above cited.

Mr. Justice Brewer, in *C., R. I. & P. Ry. Co.* v. *Stahley*, 62 F. R., 363, pronouncing the judgment of the Circuit Court of Appeals (Eighth Circuit), made a more extreme application. In that case Kansas had adopted legislation from Iowa upon the subject of liability of railroads to employés for damages resulting from negligence of other employés. This legislation had a settled construction in Iowa, and it was contended that Kansas, in adopting the statute, adopted it with the limitations placed thereon by the Supreme Court of Iowa. The court said:

> "It is undoubtedly true that when one state adopts the statute of another it is presumed to take it with the settled construction given to it in the state from which it is taken. That proposition has been often recognized by the Supreme Court of the United States; thus, in *McDonald* v. *Hovey*, 110 U. S., 619–628, 4 Sup. Ct., 142, that court, by Mr. Justice Bradley, said:
>
> "'It is a received canon of construction, acquiesced in by this court, "that where English statutes, such, for instance, as the statute of frauds and the statute of limitations, have been adopted into our own legislation, the known and settled construction of those statutes by courts of law has been considered as silently incorporated into the acts, or has been received with all the weight of authority." *Penniek* v. *Dialogue*, 2 Pet., 1, 18; Smith St. & Const. Law, Sec. 634; Sedg. St. & Const. Law, 363.'"

But the learned justice continued:

> "But, while this is an undoubted rule of con-

struction, there is another which is more applicable to the present case; and that is, that when a right is given or a liability imposed by a statute of a state, the settled determination by the courts of that state as to its scope and meaning is controlling upon the federal courts. We follow the state courts in their construction of state statutes of this nature. *Burgess* v. *Seligman*, 107 U. S., 20, 2 Sup. Ct., 10; *Claiborne Co.* v. *Brooks*, 111 U. S., 400, 4 Sup. Ct., 489; *Bucher* v. *Railroad Co.*, 125 U. S., 555, 8 Sup. Ct., 974; *Detroit* v. *Osborne*, 135 U. S., 492, 10 Sup. Ct., 1012. This rule is paramount to the one heretofore referred to. Applying it to the case at bar, if the Supreme Court of Kansas, although the statute had been adopted from the state of Iowa after it had there received a settled construction, should construe it differently, the federal courts would accept the construction placed by the Supreme Court of Kansas as the true interpretation of the statute within the limits of that state. Or, to state the proposition in another way, if a precisely similar statute was enacted in two adjoining states, and yet, notwithstanding such similarity, the settled course of decision in those states resulted in a different interpretation of the same language, the federal courts would accept the construction given by the courts of each state, respectively, as the true meaning of the statute in such state."

In *Balkam* v. *Woodstock Iron Co.*, 154 U. S., 177, 188, the court, considering the application of a state statute of limitations, quoted *Leffingwell* v. *Warren*, 2 Black, 599, 603, as follows:

> "The courts of the United States, in the absence of legislation upon the subject by Congress, recognize the statutes of limitations of the several states, and give them the same construction and effect which are given by the local tribunals. They are a rule of decision under the 34th section of the Judicial act of 1789. The construction given to a statute of a state by the highest judicial tribunal of such state is regarded as a part of the statute, and is as binding upon the courts of the United States as

> the text. . . . If the highest judicial tribunal of a state adopt new views as to the proper construction of such a statute, and reverse its former decisions, this court will follow the latest settled adjudications."

In *B. & O. R. R. Co.* v. *Baugh*, 149 U. S., 368, 373, the court, after citing at length the language of *Burgess* v. *Seligman* with approval, said:

> "Whatever differences of opinion may have been expressed, have not been on the question whether a matter of general law should be settled by the independent judgment of this court rather than through an adherence to the decisions of the state courts, but upon the other question, whether a given matter is one of local or of general law."

It comments on the earlier case of *Detroit* v. *Osborne*, 135 U. S., 492, which is peculiarly applicable to the case at bar, and says:

> "The Supreme Court of Michigan had held that the duty resting upon the city of keeping its streets in repair was a duty to the public, and not to private individuals, the mere neglect of which was a nonfeasance only, for which no private action for damages arose. This court followed that ruling, although conceding that it was not in harmony with the general opinion, nor in accordance with views of its own, and this was done on the ground that the question was one of a purely local nature. This quotation was made from the opinion in *Claiborne County* v. *Brooks*, 111 U. S., 400, 410, as fully expressing the reasons for so following the rulings of the Michigan court:
>
> "'It is undoubtedly a question of local policy with each state what shall be the extent and character of the powers which its various political and municipal organizations shall possess, and the settled decisions of its highest courts on this subject will be regarded as authoritative by the courts of the United States; for it is a question that relates to the internal constitution of the body politic of the state.'

"Observations of a similar nature are pertinent to other cases, in which this court has felt itself constrained to yield its own judgment to the decisions of the state courts."

So in *Miller* v. *Ammon*, 145 U. S., 421, 423, the court said:

"The first question must be answered in the affirmative. The precise question, on the very ordinance, was presented to the Supreme Court of Illinois, and determined by it in the case of *Dennehy* v. *Chicago*, 120 Illinois, 627. Counsel for defendant in error strenuously insists that that decision is not controlling on this court in this case, because it was not announced until May, 1887, and after this purchase had taken place. They say that this is a controversy between citizens of different states, in which the parties have a right to the independent judgment of the federal tribunals; that, prior to such decision, there had been no determination by the courts of Illinois of the validity of the ordinance; and that the decision in the *Dennehy* case was in disregard of the general course of the legislation of the State of Illinois in respect to the liquor traffic, and of the spirit of at least two decisions of that court, *Strauss* v. *Pontiac*, 40 Illinois, 126, 301, and *Wright* v. *The People*, 101 Illinois, 133. They refer us to the cases of *Pease* v. *Peck*, 18 How., 595; *Chicago* v. *Robbins*, 2 Black, 418; *Butz* v. *Muscatine*, 8 Wall., 575; *Burgess* v. *Seligman*, 107 U. S., 20; *Carroll County* v. *Smith*, 111 U. S., 556; *Gibson* v. *Lyon*, 115 U. S., 439, and *Anderson* v. *Santa Anna Township*, 116 U. S., 356, as instances in which this court did not consider itself concluded by the decision of the state court.

"While not disposed to limit or qualify in any respect what has been said so frequently as to the right and duty of independent judgment, we think that this is a case in which the decision of the Supreme Court of Illinois should control. The question is one of a particularly local character, affecting solely the internal policy of the state, in respect to which we have no reviewing power, and in which is in-

volved no matter of a Federal character, or of general commercial law."

In all matters of local interest, in the construction of state constitutions and state statutes in their relations to each other, and their application to property situated within the state limits, the decisions of the supreme court of the state establishing and interpreting the meaning and constitutionality of the statutes are rules of law and of property which the federal tribunals are bound to follow. Such has always been the rule announced and followed by the federal courts. It is only when a state statute having been decided by the supreme court of a state to be constitutional and valid is obnoxious to some clause in the federal constitution that a contrary doctrine can be declared by the federal courts. There is no assertion in the opinion that the statute in question in any way contravenes the constitution of the United States, and, on the contrary, numerous decisions of the Supreme Court of the United States have held that the bestowal by statute of certain powers, judicial in their nature, upon different executive or administrative officers of the United States is perfectly constitutional and valid.

In *New York, etc., Co.* v. *Bristol*, 151 U. S., 556, it was ruled that the decision of the supreme court court of a state that a law enacted in the exercise of police power did not impair the obligation of contracts, or deprive a person of property without due process, was not reversible by the Supreme Court of the United States upon general ideas of the requirements of natural justice apart from the provisions of the federal constitution involved.

In *Stutsman County* v. *Wallace*, 142 U. S., 293, there was a question as to the right to recover certain taxes. It had been decided in *Tyre* v. *Cass Co.*, 48 N. W. Re-

porter, 232, while the appeal was pending in the Supreme Court of the United States upon a state of facts substantially as disclosed in the Supreme Court case, that no recovery could be had. Mr. Chief Justice Fuller said:

> "It is well settled that upon the construction of the constitution and laws of a state this court, as a general rule, follows the decisions of her highest court, unless they conflict with or impair the efficacy of some provision of the federal statute or a rule of general commercial law. *Norton* v. *Shelby County*, 118, U. S., 425. *Gormley* v. *Clark*, 134 U. S., 338."

It will be noted that in this case the decision of the supreme court of a state was made, not before the litigation in which it was followed was commenced, or between the same parties, but that it was a decision made pending the appeal and was followed by the Supreme Court and a reversal had.

In *Hallinger* v. *Davis*, 146 U. S., 314, it was held that where there is no appeal under state laws, the decision of the trial court as to the validity of a statute under a state constitution is binding upon the Supreme Court of the United States. This was a case involving the validity of a statute of New Jersey under which a person was convicted and sentenced to be hanged. It was urged that the statute in question was in violation of the 14th amendment to the federal constitution. It was held that the state statute not being obnoxious to the 14th amendment, the decision of the trial court would be followed. Likewise, in *Lumber Co.* v. *Ott*, 142 U. S., 622, it was declared that the construction and effect of a state statute regulating assignments for the benefit of creditors was a question of local law in regard to which the decisions of the highest state court were a rule of property and of controlling authority in courts of the United States.

So the decision of the Supreme Court of Wisconsin sustaining the constitutionality of a state statute relating to internal improvements was declared to be binding on the Supreme Court of the United States in *Kaukauna Co.* v. *Green Bay Co.*, 142 U. S., 254.

Again, the legislative provisions in New York relating to solitary confinement and keeping the exact time of the death secret in cases of persons sentenced to death, having been upheld by the court in New York, was declared to be decided for the federal courts also in *McElvaine* v. *Brush*, 142 U. S., 155.

In *Lewis* v. *Monson*, 151 U. S., 545, it is declared that federal courts are bound to follow state decisions in relation to all proceedings for the collection of state taxes, and the effect to be given the tax deeds, unless it is claimed that some right protected by the federal constitution has been invaded.

The general rule is that in the interpretation and application of the statutes of states where no federal question is involved, the federal courts are bound by, and will follow, the decisions of the supreme courts of the states in which the statutes are enacted. *May* v. *Tenney*, 148 U. S., 60; *Morley* v. *Lake Shore R. R. Co.*, 146 U. S., 162.

The courts of the United States recognize the statutes of limitations of the states and give them the same construction which are given by the local tribunals. If these tribunals adopt new views as to the proper construction of such a statute and reverse their former decisions, the federal courts follow the latest adjudications. *Balkam* v. *Woodstock Iron Co.*, 154 U. S., 177; *Bauserman* v. *Blunt*, 147 U. S., 647.

In *Leighton* v. *Young*, 3 C. C. A., 176, it was also held that when a federal court construes a state statute

with reference to a new question, and the state court of last resort subsequently interprets it differently, the federal court should thereafter conform to such interpretation.

The extent to which the federal courts consider themselves bound by decisions of the state courts in all matters of state policy, statutes and constitution, when no federal question is involved, is shown also by the following decisions: *Union National Bank* v. *Bank of Kansas City*, 136 U. S., 223; *Southern Pacific R. R. Co.* v. *Orton*, 32 F. R., 457; *In re Converse*, 42 F. R., 217.

In *Wilson* v. *Perrin*, 11 C. C. A., 66, the question was as to the validity of a chattel mortgage executed under the laws of the State of Michigan upon property within that state, and the court said:

> "If such a mortgage is valid either under the statute law of that state or by the well-settled law of the state as declared by its highest courts, then we quite agree that the local laws control."

Citing *Bank* v. *Bates*, 120 U. S., 556; *Means* v. *Dowd*, 128 U. S., 273; *Etheridge* v. *Sperry*, 139 U. S., 266.

In *Hoyt* v. *Gleason*, 65 F. R., 685, Judge Ricks, in a controversy over the right to erect a monument on a public square, where the legality of the Monument Commission was in debate, said that the Supreme Court of Ohio had decided that the Soldiers' Monument Commission was a public authority lawfully constituted by the act of the Legislature, and that that decision finally determined the right of the legislature of Ohio to provide for the appointment of a commission, and to confer on it the powers given by the statute.

In *Park Bank* v. *Remsen*, 158 U. S., 337, it was ruled that the decision of the Court of Appeals of New York

on the question of indebtedness of a warehouse company ought to be recognized in every court as at least most persuasive, although the case in which the ruling was made had not then gone to final judgment. The language of Mr. Justice Brewer, on page 342, is especially applicable in this matter.

So, in *Erie Railroad Company* v. *Pennsylvania*, 158 U. S., 431, the question of the validity of a statute of the State of Pennsylvania, imposing a tax upon tolls, had to be decided, and the first matter for determination was what "tolls" were. The Supreme Court of Pennsylvania had given a definition of the word "tolls," and subsequently confirmed this decision, and the Supreme Court adopted this definition, saying:

> "A construction or meaning attributed to the terms of a state statute by the courts of such state, will of course be adopted by this court when called upon to decide questions arising under such legislation."

So in *Lambert* v. *Barrett*, 157 U. S., 697, in passing upon the validity of the conviction of a person and his sentence to death, the court said:

> "With the disposition of state questions, by the appropriate state authorities, it is not the province of this court to interfere, and there is no basis for the suggestion of any violation of the constitution of the United States, the denial of due process of law, or the deprivation of any right, privilege or immunity secured by him by the constitution or laws of the United States."

So in *Bardon* v. *Land and River Improvement Co.*, 157 U. S., 327, where the validity of a tax deed was the subject at issue, Mr. Chief Justice Fuller, speaking the unanimous views of the court, said:

> "We proceed, then, to the objections urged to the

> validity of the tax deed of September 5, 1870, and these must be disposed of in accordance with the interpretation of the statutes of Wisconsin by the highest judicial tribunal of that state."

And he quoted at length from *Lewis* v. *Monson*, 151 U. S., 545 and 549.

So in *Campbell* v. *Haverhill*, 155 U. S., 610, the court unanimously decided that the state statute of limitations was applicable to suits at law in patent matters, and in *Marbury* v. *Kentucky Union Land Company*, 10 C. C. A., 393, the Circuit Court of Appeals for the Sixth Circuit said that a statute regulating the distribution of insolvent estates was a rule of property, and the construction of it by the Kentucky Court of Appeals controlling in the federal courts, and Mr. Justice Gray's opinion in *Union Bank* v. *Kansas City Bank*, 136 U. S., 223, was quoted from at length.

Burgess v. *Seligman* was distinguished, and the Court of Appeals was followed, although the decision of the Kentucky Court of Appeals was not made at the time of the decision of the Circuit Court of the United States.

It is submitted that the question in case at bar is as purely local in character as any case that can be found in the books, and it is not to be distinguished in principle from the above cited cases.

In facts it is distinguishable in that Mrs. Forsyth made her experiment in litigation through all the courts of the State of Indiana, and having been defeated there, comes to this court and seeks practically a review or appeal through a collateral attack upon the judgment of the state court. It is the only case in the books, so far as we can discover, where a federal court has nullified a state law, as in conflict with the constitution of the state, notwithstanding the supreme court of the same state in a litigation be-

tween the same parties and concerning the same subject-matter had affirmed the constitutionality of the law and the validity of the proceedings. It is respectfully submitted that it ought to be the last of its kind.

V.

The court erred in holding that it is competent for the legislature of Indiana to vest legislative power in the board of county commissioners.

The legislature has provided (Burns' Annotated Statutes, 7827):

> "Such commissioners shall adopt regulations for the transaction of business; and in the trial of causes, they shall comply, so far as practicable, with the rules for conducting business in the Circuit Court."

The board is given power to administer oaths, preserve order, punish for contempt, keep record of its proceedings, pass upon the petition for annexation exactly as presented, inspect the maps, hear witnesses, objections and explanations, and from its action an appeal is given. Such power is not discretionary, but is judicial, and its exercise may be compelled by mandamus.

These powers are in the main judicial in character, and yet from the earliest times the right to confer upon the board of county commissioners such powers has been conceded in Indiana. Such right would be defended under the language of Article 7, Section 1 of the constitution of the state, which reads:

> "The judicial powers of the state shall be vested in a Supreme Court, in Circuit Courts, and in such other courts as the general assembly may establish."

But the constitution also provides, Article 3, Section 1:

> "The powers of the government are divided into three separate departments—the legislative, the executive, including the administrative, and the judicial; and no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in this constitution expressly provided."

Construing these sections together, it is obvious that if the legislature decides to constitute the board of county commissioners a judicial body, it would not be competent for it at the same time to make it a legislative body. Under the constitution the legislature is authorized to vest in the county board certain administrative functions. Article 6, Section 10, provides:

> "The general assembly may confer upon the board doing county business in the several counties, powers of a local, administrative character."

It is obvious, therefore, that the very power which the Court of Appeals in the opinion sought to be reviewed has asserted to belong to the board of county commissioners is the one power which under the constitution of the State of Indiana is denied to the county board. This makes it proper to recur again to the decision referred to in the opinion of the Circuit of Appeals, viz., *City of Peru* v. *Bearss*, 55 Ind., 576. In that case the court said that from a close examination and an analysis of the language used in the statute the action of the board of commissioners was strictly limited to the granting or denying of the power of the city's petition; that the board was not authorized to grant a part or deny a part. The logical effect of this is to declare that the will of the city, as expressed in the petition, is the measure or extent of the land to be annexed, as well as of the fact that annexation shall take place if upon trial it is found that the judicial safeguards requisite to the protec-

tion of the citizen warrant such annexation, and, it is submitted, is an absolute denial that the board is vested with plenary powers.

It will be remembered that in this case, decided in 1877, the court held, erroneously, as it is submitted, that there was no appeal allowed to either party in a proceeding for annexation. This was promptly followed at the next session of the legislature of Indiana by the act of May 31, 1879, granting an appeal to both parties in such cases.

The attempt made in the opinion sought to be reviewed to distinguish the case by *Grusenmeyer* v. *Logansport*, 76 Ind., 549, and the case of *Indiana Improvement Company* v. *Wagner*, 134 Ind., 398, would be amusing were it not to be borne in mind that it is made by a federal court in an effort to justify its action in overruling the Supreme Court of Indiana upon a question dependent alone upon the constitution and laws of that state. In this respect it ceases to be amusing and becomes a matter of the gravest importance. Without attempting to comment at length upon this attempt, we submit it is in every respect unsuccessful and far-fetched.

It is conceded that it is the common council that exercises the legislative power in the other two cases provided for by statute, to wit, platted lands and lands not platted where the owner consents. In the third case, where the owner refuses to consent, it is insisted, and is held by the Supreme Court of the State of Indiana and the Circuit Court of the United States, that the common council likewise exercises the legislative power concerned in the annexation when it resolves to petition for the annexation, which is equivalent to a declaration on its part that it will annex the land, and a submission to the court that there are reasons sufficient to justify such annexa-

tion. The opinion sought to be reviewed denies the exercise of the legislative power to a body confessedly able under the constitution to exercise such power, and which confessedly does exercise it in all other cases of annexation; and at the same time asserts that this power is vested in the board of county commissioners, which under the constitution as cited is absolutely prohibited from exercising any such power. It is submitted that not another example of collateral attack can be found in the books leading to such startling results. The question of a separation of the legislative and judicial powers, the necessity of their overlapping at times, the difficulty of delimitation, which have been recognized by the courts and made them hesitate to hold acts unconstitutional, might be properly cited in connection with this branch of our argument.

VI.

In the division of the powers of government demanded by the constitution of the State of Indiana, it is neither required nor contemplated that the line of demarcation shall be a distinct one, nor the separation absolute. The court erred in holding that the annexation of contiguous territory to cities against the will of the owner is purely legislative. Such power is judicial, and, under the constitution, exercisable by the board of county commissioners.

While the distinction between the legislative, executive and judicial departments is a fundamental one in our system of government, yet an inspection of both state and

federal legislation discloses the fact that the lines of demarcation are not observed with extreme care. The federal constitution bestows all legislative power upon Congress, all executive power upon the President, and all judicial functions upon the Supreme Court and such inferior tribunals as Congress may from time to time create, yet the distinctions between these three departments are not always observed, and frequently slight overlappings are found in federal legislation, and the validity of such statutes at times not even questioned or, when questioned, sustained. Take, for instance, the elaborate code creating and governing the issue of letters patent. The constitution (Art. 1, Sec. 8) vests in Congress the power "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

In a representative government the granting of monopolies is necessarily a legislative function.

The Commissioner of Patents is a member of the interior department, which is a branch of the executive, yet he possesses and exercises both judicial and ministerial powers in considering and granting letters patent. The applicant for letters patent files his petition or application, which is considered as to form by the Patent Office, and if the invention is found anticipated or in conflict with a pending application, the patent is refused, or an interference is declared. Issues are made up, evidence taken and a hearing had upon the questions. Appeals lie in succession from the examiner to the chief examiner, and finally to the Commissioner of Patents. If the Commissioner of Patents refuses to grant the letters, appeal may either be prosecuted from his decision to the Supreme Court for the District of Columbia, or before or after

such appeal a bill in equity may be filed in a Circuit Court to review the decision, and such appeals and suits have been frequently sustained. *Morgan* v. *Daniels*, 153 U. S., 120.

The land office is also a branch of the interior department, and yet it exercises judicial power and functions, and such action is not subject to collateral attack. *Knight* v. *United States Land Assn.*, 142 U. S., 161, 182.

The judicial character of these powers is very clear, and it was accordingly ruled that the Secretary of the Interior had no authority to annul the approval, by his predecessor, of the location of a railroad right of way, on the ground that said approval was obtained by misrepresentation or fraud, because the finding of facts necessary to authorize the location was a jurisdictional one, which the secretary had power to determine, and his action was not subject to collateral attack. *Noble* v. *Union River Logging Co.*, 147 U. S., 165.

It was also held that a statute passed by Congress creating a park in the District of Columbia, and vesting the control thereof in a board to be made up of two army officers and an engineer, was not unconstitutional. *Shoemaker* v. *U. S.*, 147 U. S., 282.

And another statute giving the president power to suspend certain provisions of the tariff act was also held to be constitutional. *Field* v. *Clark*, 143 U. S., p. 649.

See, also, *Traveler's Insurance Co.* v. *Township*, 7 C. C. A., 669; *Montana Co.* v. *St. Louis Co.*, 152 U. S., 160.

It will thus be seen that the statute of Indiana, even if construed in the way sanctioned by the Circuit Court of Appeals, is only another illustration of the many instances where the different classes of power shade or merge, the

one into the other, not permitting an absolute separation.

The courts holding that along with the admittedly judicial powers vested in the county board there is found also a legislative power is based upon the language of Section 3660, which is as follows (2 Burns' Annotated Statute, 1894):

> "The board of county commissioners, upon the reception of such petition, shall consider the same, and shall hear the testimony offered for or against such annexation; and if, after inspection of the map and of the proceedings had in the case, such board is of the opinion that the prayer of the petition should be granted, it shall cause an entry to be made in the order-book, specifying the territory annexed, with the boundaries of the same according to the survey; and they shall cause an attested copy of the entry to be filed with the recorder of said county, which shall be duly recorded in his office, and which shall be conclusive evidence of such annexation in all courts in this state."

In *Catterlin* v. *City*, 87 Ind., 45, cited in the opinion, the reasons why annexation should take place were properly stated in the petition of the town and at length. The proposed annexation was approved. Upon appeal the point was made that the petition did not show sufficient reasons. The court said:

> "The statute does not prescribe what reasons shall be set forth, and their sufficiency is necessarily left to the sound discretion of the authority passing upon the petition."

Earlier cases are cited where the stated reasons were held sufficient. This line of authority shows that from the decision in *Elston* v. *Crawfordsville*, 20 Ind., 272, down to date, the settled course has been to permit the appellate court to pass upon the sufficiency of the reasons. The court did not intend by the statement above

quoted to assert that the discretion was an absolute one, and not subject to review in the courts.

On the contrary, after citing cases as stated, the court proceeded to pass upon the sufficiency of the reasons for annexation as set forth in the petition, in the following words:

> "We think the reasons stated in this petition entirely sufficient, and they are certainly numerous enough. There was no error in overruling the demurrer to the petition and the motion to dismiss it."

In this case the action of the board and of the court upon the reasons assigned for annexation were passed upon, and this is also true of the case in *Chandler* v. *City of Kokomo*, 36 N. E., 847, where the court again stated that it was a matter of discretion, but proceeded to say:

> "While we feel entirely satisfied of the sufficiency of the reasons for the annexation as stated in the petition, we deem it advisable to repeat the rule for determining the sufficiency of an application in this respect, as we find that rule well stated in *Vestal* v. *Little Rock*, 54 Ark., 321, 15 S. W., 891, and 16 S. W., 291: 'The city limits may reasonably and properly be extended so as to take in contiguous lands (1) when they are platted and held for sale and use as town lots; (2) whether platted or not, if they are held to be bought on the market and sold as town property when they reach a value corresponding with the views of the owner; (3) when they furnish the abode for a densely-settled community, or represent the actual growth of the town beyond its legal boundary; (4) when they are needed for any proper town purpose, as for the extension of streets or sewer, gas or water system, or to supply places for the abode or business of its residents, or for the extension of needed police regulations; and (5) when they are valuable by reason of their adaptability for prospective town uses.' See, also, Beach Pub. Cor., Par. 420. Some of the reasons so held sufficient are clearly stated in the petition before us."

The same is true of *Windfall Mfg. Co.* v. *Emery* (Ind.), 41 N. E., 814. In every case the court has stated its opinion of the sufficiency of the reasons set forth in the petition, and thus in effect declared that the reasons are matters of judicial cognizance.

The fact that the law gives an appeal from the action of the county board, also tends to show that the legislature has not vested an absolute discretion in that body. It is not to be imputed to a legislative body that it at the same time granted to one court an absolute discretionary power, and to another the right to review the exercise of that power by appeal. The court is driven to the conclusion that the county commissioners sat as a court to pass upon the sufficiency of the reasons alleged in the petition, and hear evidence upon the facts therein alleged, or that there was no appeal. If the former, then the county board exercised judicial functions, and the legislative act was that of the city in resolving to file the petition, which is equivalent to a resolution to annex if the court constituted by the statute finds upon its application that the facts justify the exercise of the power, or sustain the allegations of the petition. The holding of the Supreme Court of Indiana, and of the Circuit Court of the United States, that the legislative act was that of the city when it decided to annex, makes the law consistent, makes it unnecessary to hold any act unconstitutional, and does not render the acts of May 6, 1853, and May 31, 1879, (3 Burns' Annotated Stat., 7859, and 7856[1]) wholly nugatory as applied to this subject. It is respectfully submitted that the language:

> "In cases of the annexation of unplatted lands against the will of the owner, the common council does not 'resolve to annex.' It has the power and

[1]Appendix, p. 85.

> can lawfully 'resolve,' simply to petition for the annexation of territory of defined limits, and only in respect to the limits of the territory has it a discretion which is final or conclusive. A board of commissioners in Indiana cannot order the annexation of less or more or different territory than that described in the petition. (*The City of Peru* v. *Bearss*, 55 Ind., 576.) But the final power to determine whether the annexation asked shall be ordered is given to the county board and is made wholly discretionary. The vital distinction seems to have been overlooked, that this statute does not in all particulars 'fix the conditions of annexation,' and it is not the office of the board simply to determine 'whether the conditions so prescribed by the law have been complied with.' The proceedings may be in all respects regular, and the board may find that the reasons for annexation set forth in the petition are true as stated, and yet may disregard them, and either refuse or grant annexation upon considerations not mentioned in the petition. Without a petition nothing can be done, but once the petition has been presented the board acquires control of the subject-matter, and upon proper notice may order the annexation, 'if after inspection of the map and of the proceedings' had in the case such board is of the opinion that the prayer of the 'petition should be granted.' That is to say, the board is given unqualified discretion in respect to final action upon a subject which is confessedly legislative. It is, therefore, necessarily a legislative discretion, over which, consistently with the constitutional distribution of powers, the court could not be given and cannot assume control" (Record, p. 85)—

is technical, and if adopted as a general principle would defeat many statutes heretofore regarded as constitutional. Ordinarily the fact that the county board cannot order the annexation of more or less or different territory than that described in the petition would be taken as evidence that

it was not vested with plenary power or discretion. The language,

> "if after the inspection of the map and proceedings had in the case such board is of opinion that the prayer of the petition should be granted,"

is given an exaggerated meaning. Similar language, or language much broader in terms, is often found in statutes, and has not heretofore been supposed to vest discretionary power not subject to review, and especially not where the grantor of the power had specifically declared it was not such by providing for an appeal from any decision that might be reached.

In this very act prescribing the power of county board, we see that such language has no such meaning. Section 7846 provides:

> "The county commissioners shall examine into the merits of all claims so presented: and may, in their discretion, allow any claim, in whole or in part, as they may find it to be just and owing."

Section 7850 provides:

> "The boards of commissioners may make allowances in their discretion. But it is hereby declared to be their duty to avoid, as much as possible, the necessity for making any allowance for voluntary services, or for things voluntarily furnished, by contracts for such services or things, or by ordering the same to be rendered at stipulated prices, or by vesting the power to procure such services or things in an agent by them nominated of record."

No court would hold that this language vested an arbitrary power as against an appeal given by statute.

The fact is that the law providing for the annexation of contiguous land against the consent of the owner was enacted for the public benefit in all its details.

Individual rights were protected through trial and ap-

peal. The purpose of the law, the nature and scope of the duties conferred on the county board, call loudly for the application of that well-known principle that where power is given by statute to public officers, in permissive language—as that they may, "if deemed advisable," do a certain thing—the language used will be regarded as peremptory where the public interest or individual rights require that it should be.

This principle is consonant with the nature of our institutions, which does not favor making any public officer or public body the depository of arbitrary power.

The principle as stated is in the language of this court in *Supervisors* v. *United States*, 4 Wall., 435.

In that case provision was made that the board of supervisors under an Illinois statute, if current revenues under existing statutes "is not sufficient to pay," *may, if deemed advisable*, levy a special tax, etc.

The cases are reviewed at length and a principle stated, which would, as it is submitted, require the commissioners to pass upon the petition upon evidence. The court said:

> "The counsel for the respondent insists, with zeal and ability, that the authority thus given involves no duty; that it depends for its exercise wholly upon the judgment of the supervisors, and that judicial action cannot control the discretion with which the statute has clothed them. We cannot concur in this view of the subject. Great stress is laid by the learned counsel upon the language 'may, if deemed advisable,' which accompanies the grant of power, and, as he contends, qualifies it to the extent assumed in his argument.
>
> "In *The King* v. *The Inhabitants of Derby*, there was an indictment against divers inhabitants for refusing to meet and make a rate to pay the constables' tax. The defendants moved to quash the indictment, 'because they are not compellable, but the statute

only says that they may, so that they have their election, and no coercion shall be.' The court held that 'may,' in the case of a public officer, is tantamount to shall, and if he does not do it, he shall be punished upon an information, and though he may be commanded by a writ, this is but an aggravation of his contempt.

"In the *King and Queen* v. *Barlow*, there was an indictment upon the same statute, and the same objection was taken. The court said: 'When the statute directs the doing of a thing for the sake of justice or the public good, the word may is the same as the word shall; thus, 23 Hen. VI, says the sheriff may take bail. This is construed he shall, for he is compellable to do so.'

"These are the earliest and the leading cases upon the subject. They have been followed in numerous English and American adjudications. The rule they lay down is the settled law of both countries.

"In *the Mayor of the City of New York* and in *Mason* v. *Fearson*, the words 'it shall be lawful' were held also to be mandatory.

"The conclusion to be deduced from the authorities is, that where power is given to public officers, in the language of the act before us, or in equivalent language—whenever the public interest or individual rights call for its exercise — the language used, though permissive in form, is in fact peremptory. What they are required to do for a third person the law requires shall be done. The power is given, not for their benefit, but for his. It is placed with the depository to meet the demands of right, and to prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid, and who would otherwise be remediless.

"In all such cases it is held that the intent of the legislature, which is the test, was not to devolve a mere discretion, but to impose a 'positive and absolute duty.'"

As has been shown, the county board can be given no legislative authority under the constitution of the State of Indiana; the common councils of cities may be given such

power; all the statutes may be reconciled and remain in force if the resolution to present a petition is deemed an expression of the legislative will, provided the courts constituted to try the issues so far as they affect the rights of parties shall determine that the conditions justifying the exercise of the power as prescribed by the statute are found in the particular case; this is the ordinary manner of exercising both the legislative and judicial powers of government; the one prescribes how and in what manner rights shall exist and be established, and leaves to the courts the duty of ascertaining whether the conditions making the law applicable, or justifying the exercise of the legislative power, are found in each particular instance. It can not be too constantly borne in mind that under our system of government nothing is done by mere parliamentary or legislative edict, and absolute power is not frequently found in connection with laws dealing with rights of life, liberty or property.

On the contrary, we submit that under the constitution of the State of Indiana the act regarding the annexation of territory to cities would have been unconstitutional had it not provided for the submission of the controversy to the courts.

Article 11, Section 13, provides:

> "Corporations other than banking shall not be created by special act, but may be formed under general laws."

And Section 57 of the bill of rights of Indiana provides (1 Burns' Annotated Statutes, page 28):

> "All courts shall be open; and every man, for injury done to him, in his person property or reputation, shall have remedy by due course of law. Justice shall be administered freely and without purchase; completely, and without denial; speedily, and without delay."

In view of these last constitutional provisions, it is submitted that neither a special act of the legislature, making additions to the boundaries of a municipality, nor an act of the common council annexing lands to such boundaries without the consent of the owner, and giving him an opportunity to be heard, would be constitutional.

The necessity of this union of powers and that such controversies regarding annexation are judicial or so far quasi-judicial as to justify their commission to the courts, and that the constitutional requirement as to the separation of powers is not thereby violated, is sustained in *Burlington* v. *Leebrick*, 43 Iowa, 252; *Kayser* v. *Trustees*, 16 Mo., 88; *Borough of Little Meadows*, 35 Pa. St., 335; *Gottschalk* v. *Becher*, 49 N. W., 715; *Elder* v. *Incorporators*, 21 S. E., 738; *Forest Co.* v. *Langlade Co.*, 45 N. W., 598; *Callen* v. *Junction City* (Kas.), 7 L. R. A., 736; *People* v. *L. I. Ry. Co.*, 31 N. E., 873; *State* v. *Higgins* (Mo.), 28 S. W., 638; *People* v. *Provines*, 34 Cal., 540; *State* v. *Ensign*, 56 N. W., 1006; *State* v. *District Court*, 22 N. W., 625; *Wheeling Bridge Co.* v. *Paull*, 19 S. E., 551.

VII.

The court by its decision erroneously denied to the judgment of the Supreme Court of Indiana that full faith and credit required by Article IV, Section 1, of the Constitution of the United States and the legislation of Congress enacted in pursuance thereof.

Article IV, Section 1, of the constitution of the United States provides:

> "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proven and the effect thereof."

Section 905 of the Revised Statutes of the United States provides:

> "The acts of the legislature of any state or territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such state, territory or country affixed thereto. The records and judicial proceedings of the courts of any state or territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings so authenticated shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken."

In most cases where the courts have been called upon

to construe these provisions the question has been one of evidence arising in state courts and dependent upon the authentication, or the effect to be given in the one state court to the judgments of the courts of the sister state; but it is an error to suppose that the provisions are designed only to preserve harmony between the several states and insure that courtesy and comity which the entire constitution was designed to perpetuate.

It will be observed that Section 905, R. S. U. S., is a compliance by Congress of the permission given in the last clause of Section 1, Article IV, to prescribe the manner in which acts, records and proceedings shall be proved. The first clause or sentence of the section of the constitution quoted requires no legislation of Congress, as it is self-executing; and therefore the faith and credit due to a record as a judicial proceeding of a state is given by the constitution independently of all legislation.

Such is the decision of the Supreme Court in *McElmoyle* v. *Cohen*, 13 Pet., 312, 324, where the court, speaking by Mr. Justice Wayne, said:

> "The authenticity of a judgment and its effect depend upon the law made in pursuance of the constitution; the faith and credit due to it as the judicial proceedings of a state is given by the constitution independently of all legislation."

In *Mills* v. *Duryee*, 7 Cranch, 481, 485, it was contended that in any event the act was not applicable to a record of a state court sued upon in a court of the United States. The court said:

> "The words of the act afford a decisive answer, for they extend to every court within the United States."

So in *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S., 265, 291, the court says (Gray, J.):

> "Those provisions establish a rule of evidence rather than of jurisdiction. While they make the record of a judgment, rendered after due notice in one state, conclusive evidence in the courts of another state, or of the United States, of the matter adjudged, they do not affect the jurisdiction, either of the court in which the judgment is rendered or of the court in which it is offered in evidence. Judgments recovered in one state of the Union, when proved in the courts of another government, whether state or national, within the United States, differ from judgments recovered in a foreign country in no other respect than in not being re-examinable on their merits, nor impeachable for fraud in obtaining them, if rendered by a court having jurisdiction of the cause and of the parties. *Hanley* v. *Donoghue*, 116 U. S., 1, 4."

The case of *Mills* v. *Duryee*, *supra*, is reviewed with many others in *Thompson* v. *Whitman*, 18 Wall., 457, 463, and the general language of the case is limited to the extent that the fact of jurisdiction of the court rendering the judgment may be contradicted.

The court said, quoting Story on Constitution, p. 281:

> "It is only when the jurisdiction of the court in another state is not impeachable, either as to the subject-matter or to the person, that the record of the judgment is entitled to full faith and credit. The court must have had jurisdiction, not only of the cause, but of the parties, and in that case the judgment is final and conclusive."

The recitals of the decree or findings of fact necessary to constitute jurisdiction, *e. g.*, service of persons, are not conclusive when the record is offered in another jurisdiction, and the want of jurisdiction may be there shown collaterally. This fact, however, has nothing to do with the presumptions attending the exercise of jurisdiction by courts of general jurisdiction, or the judgments rendered by such courts, a subject we have discussed elsewhere.

The case of *Thompson* v. *Whitman* was a case where the effect of a judgment of a state court was considered in the United States court.

It is supposed that there will be no denial of the proposition that it is as much the duty of the courts of the United States to give full faith and credit to the proceedings of every state as it is that the courts of one state should accord this faith and credit to the judicial proceedings of any other state. The case at bar is one where the courts of the United States were exercising their original and not an appellate jurisdiction. In the exercise of their original jurisdiction these courts take notice without proof of the laws of the several states (*Lloyd* v. *Matthews*, 155 U. S., 222, 227) and of the decisions of the courts of last resort therein. *Pennington* v. *Gibson*, 16 How., 66, 81. In this case the court said:

> "But it is equally true in regard to superior courts or courts of general jurisdiction, that every presumption is in favor of their right to hold pleas, and that if an exception to their power or jurisdiction is designed, it must be averred and shown as a matter of defense. Such is the general rule as laid down by Chitty, Vol. 1, p. 442. So in the case of *Shumway* v. *Stillman*, in 4 Cowen, 296. The Supreme Court of New York, speaking with reference to a judgment rendered in another state, says: 'Every presumption is in favor of the judgment. The record is *prima facie* evidence of it, and will be held conclusive until clearly and explicitly disproved.' And in further affirmation of the doctrine here laid down, we hold that the courts of the United States can and should take notice of the laws and judicial decisions of the several states of this Union, and that with respect to these nothing is required to be specially averred in pleading which would not be so required by the tribunals of those states respectively."

There is no contention but that the county board had jurisdiction for every purpose; the court's opinion con-

cedes the appellate jurisdiction of the circuit court upon all questions but those of a discretionary character; the record is silent as to what questions were decided by the county board or how; an appeal was taken to the circuit court having general jurisdiction; the cause proceeded to judgment, all parties in interest being present in person or by attorney; an appeal was taken to the Supreme Court of the State of Indiana, and all parties again were present. The judgment was affirmed; no question is raised as to the jurisdiction of the courts on the ground of fraud or want of notice. There is no averment in the bill overcoming the presumption attendant upon the exercise of jurisdiction on the judgments rendered by courts of general jurisdiction; the requirement that full faith and credit shall be given to the judicial proceedings of every state is obligatory upon the courts of the United States, and applies in every stage of the proceedings when the record is offered in evidence, or where a collateral attack is made by suit *inter partes* not on jurisdictional grounds affecting the service of process. The court takes judicial notice of the decision of the Supreme Court of Indiana and the date of its rendition, which was prior to the filing of the bill in this case in the Circuit Court; the averments of the bill and the opinion of the court show that this court has knowledge that the parties and the subject-matter of the suit are the same. Under such circumstances the action of the Circuit Court of Appeals in denying the validity and conclusiveness of the judgment of the Supreme Court of Indiana, and affording complainant relief which she could not obtain in the courts of that state, is a violation of the constitution of the United States. *Laing* v. *Rigney*, 160 U. S., 531, 542.

In this argument we have not dwelt upon the unfortunate results which must follow upon an adherence by

the court to the views expressed in the opinion. Differences between the state and federal tribunals are always to be deprecated, and doubly so where the difference exists with reference to a matter of local character, closely affecting the interests and welfare of the people concerned. This is emphasized if the difference relates to matters of self-government or mere police regulations with which the citizens constituting the political corporation of the state feel that the general government and its courts can have no concern. The founders of our institutions preserved with jealous care the right of local self-government.

Much was averred in the bill, and is repeated in the statement of the Circuit Court of Appeals, concerning the unimproved character of the land, and that it is not needed for settlement. If it is, as alleged, wet and swampy, the City of Hammond may need, in the exercise of a due regard for the health of its people, to drain the tract and prepare it for habitation; it may be that gambling in its most offensive forms is carried on upon this tract, and to such an extent and in such close proximity to the city that due regard for the morals and safety of its citizens and the future growth of the city requires the extension of a police jurisdiction for which, perhaps, the general powers of the Governor of the state have proved inadequate, and in the opinion of all concerned, the local authorities are, perhaps, more competent to deal. These suppositions may be true, and would be held true were this court to take judicial notice of current events and public action of the chief executive officer of the State of Indiana. If true, the people having their homes and families in Hammond must necessarily greatly regret that the Circuit Court of Appeals has found it necessary to interfere in a matter of such local concern, and that, too,

in disregard of the deliberate judgment of the Supreme Court of the State of Indiana. It is said that the non-resident citizen has a right to the independent judgment of this tribunal. It is respectfully submitted that he has no such right after he has had his day in the courts of the state and there suffered defeat. The federal courts are not courts of review in such a case as the one at bar, involving no federal question, or question of general contract or commercial law, and non-residence confers no such extraordinary right.

Again, the consequences are disastrous if that territory within the description of the petition filed with the county board is annexed as to all owners of land embraced therein who reside in Indiana, and cannot therefore appeal to the United States courts, and also as to all non-resident owners whose tax is so small that the amount involved does not give the federal court jurisdiction, while the same proceeding is void as to the appellant. Such results should be avoided if possible. It is submitted that every possible interest will be subserved if the court shall require the cause to be certified to it for its review, and that upon an examination of the record it must be concluded that a most unwarranted invasion of the rights of the state and its courts is presented.

Respectfully submitted,

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APPENDIX.

The following are the sections of the Indiana statutes (Burns' Revision, 1894), which are cited but not quoted in the foregoing brief:

Section 3659:

> "The limits of any city may be extended over any lands or contiguous territory, by the consent of the owner thereof in writing, and a resolution of the common council, passed by a two-thirds vote, extending the limits of such city over such lands or territory; which written consent and resolution shall be entered at length in the records of such city; and the common council shall cause a certified copy of both to be recorded in the recorder's office of the proper county. If any city shall desire to annex contiguous territory not laid off in lots, and to the annexation of which the owners will not consent, the common council shall present to the board of county commissioners a petition setting forth the reasons for such annexation. and, at the same time, present to such board an accurate description, by metes and bounds, accompanied with a plat of the lands or territory proposed or desired to be annexed to such city. The common council shall give thirty days' notice, by publication in some newspaper of the city, of the intended petition, describing in such notice the territory sought to be annexed."

Section 7831:

> "Such commissioners shall cause to be recorded, in a book to be kept for that purpose, their proceedings and determinations touching all matters properly cognizable before them. All the books, accounts, vouchers, papers and documents touching the business or property of the county, shall be carefully kept by the auditor, and open to the inspection of any person."

Section 1366:

"Said court shall have original, exclusive jurisdiction in all cases at law and equity whatsoever, and in criminal cases and actions for divorce, except where exclusive or concurrent jurisdiction is or may be conferred by law upon justices of the peace. It shall also have exclusive jurisdiction of the settlement of decedents' estates and of guardianships; provided, however, that in counties in which criminal or superior courts exist or may be organized, nothing in this section shall be construed to deprive such courts of the jurisdiction conferred upon them by law. And it shall have such appellate jurisdiction as may be conferred by law; and it shall have jurisdiction of all other causes, matters and proceedings where exclusive jurisdiction thereof is not conferred by law upon some other court, board or officer."

Section 7856:

"Any person or corporation feeling aggrieved with any decision of the board of county commissioners made as hereinbefore provided, may appeal to the Circuit or Superior Court of such county, as provided by law. No appeal shall be from the decision of said board making allowances for services voluntarily rendered or things voluntarily furnished for the public use. From other decisions or allowances an appeal may be taken within thirty days to the Circuit or Superior Court of the county, the party giving sufficient bond against cost, payable to said board. If a claim be disallowed in whole or in part, except where the claim is for services voluntarily rendered or things voluntarily furnished, the claimant may appeal, or, at his option, bring an action against the county; but if he shall not recover more on such appeal than is allowed, he shall pay the costs of such appeal."

Section 7859:

"From any decision of such commissioners there shall be allowed an appeal to the Circuit Court by

any person aggrieved; but if such person shall not be a party to the proceedings, such appeal shall not be allowed, unless he shall file, in the office of the county auditor, his affidavit, setting forth that he has an interest in the matter decided, and that he is aggrieved by such decision, alleging explicitly the nature of his interest."

Section 7865:

"Such court may make a final determination of the proceedings thus appealed, and cause the same to be executed, or may send the same down to such board with an order how to proceed, and may require such board to comply with the final determination made by such court in the premises."

Section 7827:

"Such commissioners shall adopt regulations for the transaction of business; and in the trial of causes, they shall comply, so far as practicable, with the rule for conducting business in the Circuit Court."

Office Supreme Court, U. S.
FILED
OCT 12 1896
JAMES H. McKENNEY,
CLERK.

164-706

Supreme Court of the United States,

OCTOBER TERM, A. D. 1896.

IN THE MATTER OF THE APPLICATION OF THE CITY OF HAMMOND FOR A WRIT OF CERTIORARI

IN THE CASE OF

615

CAROLINE M. FORSYTH, *Appellant,*

vs.

THE CITY OF HAMMOND AND WILLIAM KLEIHEGE, TREASURER OF THE CITY OF HAMMOND,

Appellees.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF AGAINST PETITION FOR CERTIORARI.

THOS. J. MERRIFIELD,
Solicitor for Appellant below, Respondent here.

W. H. H. MILLER,
OF COUNSEL.

BARNARD & MILLER PRINT, CHICAGO.

BRIEF AGAINST PETITION FOR CERTIORARI.

As the supplemental brief filed herein by Mr. Miller contains a full and clear statement of the case I adopt it, and proceed straightway *in medias res*.

I.

The judgment sought to be reviewed, however apparently decisive of the merits, is not such a judgment as may be reviewed in this court at the present stage of the case.

One objection to the granting of the writ of *certiorari* in this case is that the judgment sought to be reviewed is not a final judgment.

The judgment is set forth in Exhibit C, on page 92 of the petition, and is as follows :

"*Caroline Forsyth, appellant,* v. *The City of Hammond, et al.*

"This cause came on to be heard on the transcript of record in the Circuit court of the United States for the district of Indiana, and was argued by counsel.

"Upon consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said Circuit court refusing a temporary restraining order in this cause be, and the same is hereby reversed with costs, and that this cause be, and the same is hereby remanded to the Circuit court, with directions to take such proceedings as are not inconsistent with the opinion of this court."

On page 94 of said petition, the ruling of the court on the petition of appellees for rehearing is set forth as follows :

"It is ordered by the court that the petition for rehearing in this cause be, and the same is hereby overruled. And it is further ordered that mandate be withheld by the clerk of this court until further order of court."

No mandate has as yet been issued. The case was tried in the Circuit court the same as if there had been a formal demurrer filed to the bill of complaint. The decision of that court was therefore equivalent to sustaining such demurrer.

See petition herein, pp. 55, 56.

The decision of the Circuit Court of Appeals merely reverses that ruling and the judgment for costs therein rendered and remands the cause for further proceedings not inconsistent with the opinion of the last named court. Until such further proceedings are had and ended in a judgment against the petitioner, an application for writ of *certiorari* ought not to be granted.

In *Northwestern Railway Company* v. *Osborne*, and in the same v. *Junod*, 146 U. S., 354, 355, the writ of *certiorari* was denied by this court on the ground that the judgment of United States Circuit Court of Appeals was not a final judgment. Each of the petitioners in these cases had obtained a verdict and judgment against the said railway company in the Circuit court. Said company sued out a writ of error in each case and took the same to the United States Circuit Court of Appeals, which court determined that it was the duty of the Circuit court, under the facts set forth in the record, to

have directed a verdict for the defendant company, and that no cause of action existed in either case against said company, and said Court of Appeals remanded said cause to the Circuit court for further proceedings consistent with such opinion. Osborne and Junod, defendants in error, respectively, each applied to this court for a writ of *certiorari*. The Chief Justice denied the writ in both cases and referred to the following authorities:

McLish v. *Roff*, 141 U. S., 661 (35, 873).
Rice v. *Sanger*, 144 U. S., 197 (36, 403).
Meagher v. *Minn. Thresher Mfg. Co.*, 145 U. S., 608 (36, 837).

In *McLish* v. *Roff*, *supra*, a writ of error was sued out from the United States Supreme court to a United States Circuit court for the Indian Territory. The writ of error was dismissed by this court on the ground that appeals or writs of error can be taken only from final judgments.

In *Rice* v. *Sanger*, *supra*, the Supreme court of Kansas had reversed a judgment of the District court of Bourbon county, and remanded the cause for further proceedings in accordance with the opinion of the court. To review this judgment, a writ of error was allowed by this court, but was afterwards dismissed on the grounds that the judgment sought to be reviewed was not a final judgment.

In *Meagher* v. *Minn. Thresher Mfg. Co.*, *supra*, it was held that a judgment of the Supreme court of a state merely affirming an interlocutory order of the lower court was not subject to review in this court, however apparently decisive of the merits. As the writ of *certiorari* performs the same function as a writ of error or appeal,

it ought not to be granted at any stage of the proceedings in the court below (when a writ of error or appeal in a case in which such writ is allowable at the proper stage) would be denied on account of such proceedings not having been determined and ended. In *re* Wood's petition, 143 U. S., 202. It was held that the questions (1) Whether it is settled law in Minnesota that a judgment of dismissal in a former suit such as was pleaded, was not a bar to a second suit for the same cause of action; (2) whether the law in respect of recovery by a servant against his master for injuries received in the course of his employment had been properly applied on the trial of a case, do not fall within the category of questions of such gravity and general importance as to require the review of the Circuit Court of Appeals in reference to them.

The writ of *certiorari* was denied.

To come within the ruling that a judgment should be final, the court below should have nothing to do but to execute it, if affirmed.

Keystone v. *Martin*, 132 U. S., 91.
Bostwick v. *Brinkerhoff*, 106 U. S., 3.

While there have been many applications to this court for writs of *certiorari* to the Circuit Court of Appeals, only two, so far as we are aware, have been granted. One was *In re Lauw Ow Bew*, 141 U. S., 583, which involved a grave question of international law affecting the relations between the United States and China. Another was *In re Fabre*, petitioner, decided at the October term, A. D. 1892, of this court,—an admiralty case which involved an important question as to the rules of navigation, and in which the Court of Appeals reversed a decree

of the district judge, one of the three judges dissenting, and in each of these cases the Circuit Court of Appeals had declined to certify the question to this court.

This court has always held that its power to issue writs of *certiorari* to perform the office of writs of error or appeal, should be exercised sparingly, and with great caution, and only in cases of peculiar gravity and general importance, or to secure a uniformity of decisions. In this case, no application has been made to the judges of the Circuit Court of Appeals to certify the case to this court, nor have they ever declined doing so.

II.

Both the petition and brief herein contain a statement of a pretended fact not in the record, and which does not, and never did exist.

Beginning at page 1 of the petition, is the following statement:

"*Second*. That in June, A. D. 1893, the common council of the said city, pursuant to the powers vested in such council by the statutes of said state, duly resolved and passed a resolution to annex to the said city certain territory contiguous to said city, not laid off in lots, and to the annexation of which the owners thereof would not consent," etc.

This statement is repeated in the first paragraph of the brief on the other side, and is again repeated on page 20 of said brief. The statement is absolutely without any foundation in fact whatever. There is no statute of Indiana authorizing the common council to pass such a resolution, and if they had done so, it would have been an absolutely void act.

See *City of Delphi* v. *Startzman*, 104 Ind., 343 (346).

But the common council did not attempt to do such an idle and futile thing. They merely drew up and signed a petition to the county board, requesting such board to annex the territory in question, and authorizing the city attorney to present the petition to said board. This is all the common council did do, or had any lawful right to do, and all the record shows in regard to this matter.

See Exhibits A and B hereto appended.

Counsel were probably misled by the language of Judge HOWARD of the Supreme court of Indiana in his opinion overruling the motion for rehearing in *Forsyth* v. *Hammond.*

See Exhibit B, page 23 of the petition herein, where said Howard says:

"It may be conceded that annexation of territory to a city is a legislative function. This function is exercised by the common council when it resolves to annex certain described lands to the city and to present a petition therefor to the county board." How Judge Howard came to make this erroneous assumption of a fact in the case which did not appear in the record, and was absolutely unfounded in fact, we can only conjecture. We shall have occasion in a subsequent part of this brief to discuss more fully this unwarranted assumption of that learned judge, and the opinion thereon founded.

III.

The writ ought not to issue for that the petition and brief fail to show any error in the record.

The first assignment of error is as follows:

"The court erred in taking cognizance of this proceeding or considering the same, because Federal courts have no jurisdiction of a suit to set aside a decree of a state court on the ground that such decree is utterly void when tested by an inspection of the record, since in such a case, a motion, appeal or bill of review in the court which made the decision is the proper and sufficient remedy."

This assignment, we think, may be easily and readily disposed of. It does not meet the case in hand. It presents no question properly examinable in this case. It is wholly inapplicable and irrelevant to any real question presented by the record. This is not an application to set aside a decree of a state court on the ground that such decree is utterly void when tested by an inspection of the record. It is an application for relief from unjust and unlawful taxation imposed under color of a decree of a court which is a nullity and which that court had no power under any state of facts or circumstances to make. Such a decree or judgment is a mere *brutum fulmen* conclusive upon nobody and may be treated everywhere and under all circumstances by every court and by every person as an absolute nullity.

Earl v. *Earl*, 91 Ind., 27 (42).
Bryan v. *Blythe*, 4 Blackf., 246 (252).
Louisville Railway Co. v. *Hubbard*, 116 Ind., 193 (197).
Patterson v. *Prior*, 18 Ind., 441.

The cases cited by counsel under this assignment of error are wide of the mark. It would be a waste of time and labor to review them in detail. They are all cases in which the state courts, or the Federal Circuit courts might have acquired jurisdiction over the subject-matter and the person, and in which the judgments rendered did not transcend the scope of their powers; and the rule laid down as to the federal courts is that they are of limited jurisdiction, but not on that account inferior courts in the technical sense whose judgments taken alone are to be disregarded. If the jurisdiction be not alleged in the proceedings their judgments and decrees are erroneous, and may upon writ of error or appeal be reversed for that cause, but they are not absolute nullities. We will take one case as a fair specimen of them all. That of *Little Rock Junction Railway* v. *Burk*, 66 Fed. Rep., 83.

This was a bill in equity brought in the Circuit court of the United States for the Eastern district of Arkansas, to establish title in the plaintiff and recover certain premises from the defendant. The complaint alleged that the Railway Company was in possession of land under a conveyance from one Stiewell; that Stiewell claimed to have bought the property on a tax sale which had been ordered by the Pulaski Chancery court. That the title thus claimed by the Railway Company was void for the reason that the said court never acquired jurisdiction over the complainant in the suit to condemn and sell the property for overdue taxes. The tax suit in question was brought under the provisions of an act of the legislature of Arkansas. The contention on the part of complainant was that the Chancery court never acquired jurisdiction because the proof of publication of notice, which the law required, did not on its face appear to be sworn

to, but the record recited that the notice had been duly published more than forty days before the time of making the order of sale, and that proof of publication of such notice verified and proved as required by law was filed in the proper office. The record nowhere showed that the recitations as to the publications of notice were in fact false. The court, in delivering their opinion, say: "For aught that appears on the face of the record in the tax suit, the warning order may have been published precisely as the statute required, and proof of it may have been made to the satisfaction of the Chancery court."

"The contention of the complainant in the Circuit court seems to have been that the decree of the Chancery court was void on its face and assailable in a collateral proceeding, because proof of the publication was not verified, and because a statute of Arkansas declares that the affidavit of any editor, publisher, etc., of any newspaper, etc., to the effect that a local advertisement had been published in his paper for the length of time and number of insertions, with a printed copy of such advertisement appended thereto, subscribed before any officer authorized to administer oaths, shall be the evidence of the pulication thereof as therein set forth. In other words, it seems to have been claimed and decided that the decree rendered in a suit founded on the act of March 12, 1881, is utterly void if the record does not contain the statutory evidence of publication; that decrees rendered in such suits are not entitled to the benefits of those presumptions which ordinarily attend and support the judgments of courts of superior jurisdiction when the record does not affirmatively show that no jurisdiction was in fact alleged." * * * "*It is manifest that the facts offered to impeach the decree in the*

suit to foreclose the tax lien was such testimony as would have been admissible to support a bill of review to vacate the decree had the complainant seen fit to commence a suit of that kind in the Pulaski Chancery court. It is also obvious that if the decree of the Chancery court is in fact void on the ground that was and is relied upon to establish its invalidity, that is to say—want of jurisdiction apparent on the face of the record—then complainant could have obtained as full relief by a bill of review in the Chancery court as by an original bill filed in the Federal Circuit court."

"In addition to the consideration that a bill of review would have furnished an adequate remedy, it must also be borne in mind that the remedy by appeal was originally open to the complainant, if he had seen fit to prosecute an appeal.

"Moreover, it is a general rule that a court of superior jurisdiction has power at any time to vacate its own judgment when it appears from an inspection of its record that such judgment or decree is utterly void for want of jurisdiction either over the person or subject-matter."

Although it is evident from the foregoing quotation that the court did not regard the decree in question as void from an inspection of the record, yet they put their decision reversing the decision of the Circuit court upon the ground that said court could not entertain the suit because complainant had a complete and adequate remedy by bill of review or motion to vacate in the Chancery court, or by appeal, or by an action of ejectment. In other words, the decision was put upon the ground that the bill contained no matter of equitable jurisdiction in the Circuit court of the United States. That this is so

is conclusively shown by the following extract from the opinion on page 91:

"Moreover, as the present action was brought and prosecuted upon the theory that the decree of the Chancery court is utterly void when tried by the record it follows that the remedy by ejectment was also open to complainant, for no doctrine is better established than that a sale under a decree rendered without jurisdiction confers no title and that such decree is open to impeachment in any collateral proceeding when the want of jurisdiction is apparent upon the face of the record.

Galpin v. *Page*, 18 Wall., 350.
Coyte v. *Haven*, 30 Conn., 190.
Adams v. *Coles*, 95 Mo., 501.
Frankel v. *Satterfield*, 19 Atlc., 398.
Ferguson v. *Jones*, 20 Pac., 842.
Black on Judgments, sections 278-407.

Forasmuch then as the injury complained of was subject to redress in the modes above indicated, we are constrained to hold that the Federal court ought not to have intervened as it did, notwithstanding the fact that the decree complained of had already been executed."

This is a fair specimen of all the cases cited by counsel under this head. "*Ex uno, disce omnes.*" If any authority were needed to show that a void judgment may be attacked collaterally, we could wish no stronger case than this. It is direct authority against the proposition of counsel that the decree of the Porter Circuit court cannot be treated as utterly void, although such decree transcended the powers of said court on account of the same being of a legislative and not judicial nature.

On page 19 of their brief, counsel say:

"The lack of jurisdiction is not found from any affirmative fact appearing in the record, but is presumed from the silence of the record." This is a complete ignoring of the fact that the record does show affirmatively that the trial court rendered a decree of annexation without the consent of the county commissioners, and without the finding of any fact or facts whatever, either by the court or by the jury. In other words, the record shows affirmatively that the trial court in rendering such decree exercised, or attempted to exercise a legislative function.

IV.

The second assignment of error is as follows:

"The judgment of the state courts having jurisdiction both of the person and of the property of the appellant, was not subject to collateral attack in the Circuit court of the United States, and it was error to sustain such an attack in this proceeding."

On page 22 of their brief, counsel make in italics, this most extraordinary and startling assertion:

"*Under such circumstances, it is confidently asserted that there being nothing in the record to overturn the presumption, any other tribunal asked to sustain a collateral attack is bound to presume that it appeared to and was found by the Circuit court that the county board deemed it advisable to annex the territory in question and that the reasons were sufficient, but were prevented from granting the prayer of the petition because it was found that the territory was not contiguous, was not platted, or the notice was defective, or some finding*

made upon one or more judicial facts which the court says 'would doubtless give the petitioner the right to appeal.'"

Here we have the novel and unheard-of assertion that an Appellate court may go outside of the record before it and find what facts were in issue before the inferior court and what were the conclusions of such court in regard to all those issues, when such inferior court has dismissed the case without any finding of fact whatever. We respectfully submit that the absurdity of this bare and unsupported proposition is too manifest to need any further refutation than the mere statement of it.

Counsel further say: "The first thing the State Circuit court was required to do, was to determine its own jurisdiction." It was competent to do this. Under well settled rules, its decision upon this point was conclusive, and not subject to collateral attack except on the ground of fraud or mistake, or as to the facts of service necessary to acquire jurisdiction."

"In this case, the collateral attack is made by a person who was present in the litigation in the said court in person and by counsel and the alleged want of jurisdiction is based upon an unwarranted presumption or guess on the part of the Circuit Court of Appeals,—that the action of the board was based upon what would constitute legislative action rather than judicial reasons." And again on page 31, counsel say:

If the Circuit court sustained the appeal and the record did not contain a detailed statement or finding on the subject, it would be upon collateral attack presumed beyond controversy under the principles of the decisions that the Circuit court had passed upon the question, and

had decided that the action of the commissioners was based upon their adverse finding of some jurisdictional fact, and not upon their discretion."

A very satisfactory and conclusive answer to this proposition is this :

The decree of the Porter Circuit court shows upon its face without any injection into the record that it is an attempted annexation of territory to a city.

The annexation of territory to a municipality is an act of legislative power, admitted so to be by Judge Howard of the Supreme court of Indiana in his opinion overruling the petition for rehearing in *Forsyth* v. *Hammond*.

In Indiana the judiciary is forbidden by the constitution to exercise that power. The legislative power and discretion to annex contiguous unplatted territory to a municipality without the consent of the owner or owners of such territory has been vested by the legislature of Indiana exclusively in the county commissioners. No annexation of such territory can be made therefore without the exercise of the power vested in them. The decree of the Porter Circuit court is therefore an usurpation of the power thus vested in the commissioners and an attempted exercise of a strictly legislative function.

The record in this case shows that the annexation was made without the exercise of any legislative discretion in favor of it by the commissioners,—the only body that could exercise it. It is therefore void on its face and no presumption can aid it.

The argument of counsel asks the court to presume that the case was tried and decided in the Circuit court upon questions of fact only. But, how would that

aid counsel? Suppose it was tried in that court upon the question, for instance, whether the territory was contiguous, and the court found in favor of the city on this and all other jurisdictional facts. Could the court then dispense with that legislative discretion which is vested in the commissioners and go on and make a valid decree of annexation? Certainly not, for that discretion must be put forth and exercised before any valid annexation can be made. Counsel could derive no aid therefore from this presumption, even if it were allowed to be legitimate.

To derive any benefit from presumptions, counsel would have to go further and not only ask, but persuade this court to presume that the trial court decreed the annexation on the ground that the commissioners had exercised their discretion and that the territory ought to be annexed.

Counsel, we apprehend, would hardly attempt that, for that would be to ask this court to presume something in direct conflict, not only with the record in this case, but with the record of the Hammond case in the Supreme court.

The record and judgment of the Porter Circuit court show affirmatively that it exercised, or attempted to exercise, the legislative power and discretion which is vested exclusively in the commissioners. It tried the case by the aid of a jury. The jury were sent out by the court to view the premises. After doing so, they returned the following verdict:

"We, the jury, find for the plaintiff (Hammond), and that the territory described in the petition ought to be annexed."

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The record and judgment of the Porter Circuit court show affirmatively that it exercised, or attempted to exercise, the legislative power and discretion which is vested exclusively in the commissioners. It tried the case by the aid of a jury. The jury were sent out by the court to view the premises. After doing so, they returned the following verdict:

"We, the jury, find for the plaintiff (Hammond), and that the territory described in the petition ought to be annexed."

Thereupon the court, over a motion for a new trial, rendered judgment that the territory described in the petition be annexed. There was no finding of any fact or facts either by the jury or by the court. These facts are shown on page 37 of our principal brief in this case in the Circuit Court of Appeals, an extract from which we here subjoin:

"What fact or facts were found in this case, either by the court or jury, upon which the law *ex proprio vigore* could act? Not a single one. The jury exercised the functions of legislators, and by their verdict expressed their opinion that the territory ought to be annexed. Upon the return of the verdict, the court in its turn, without declaring any fact or facts to exist, exercised the legislative function pure and simple, and declared that the territory be annexed; and if the annexation is to stand it must be by virtue of that decree, and not by virtue of any fact or facts found either by the court or jury upon which the law can operate and execute itself, according to Judge Baker's theory."

This statement has never been challenged or questioned. It therefore stands as a correct statement of the record in the Porter Circuit court. Moreover, counsel on page 79 of their brief, in support of their petition for rehearing in the Circuit court of Appeals, say:

"The court takes judicial notice of the decision of the Supreme court of Indiana and the date of its rendition." If this be so, then this court must also take judicial notice of the whole record in that case which shows the facts above stated.

Further, the record in this case shows that the judgment of the Board of Commissioners was against the an-

nexation of the territory and against the city of Hammond and in favor of the complainant and other remonstrants before said board; that on appeal of the case to the Lake Circuit court there was a change of venue to the Porter Circuit court and a pretended trial by jury, resulting in a verdict and judgment of annexation.

See Exhibit C of petition herein, beginning at the bottom paragraph on page 52.

The case, therefore, stands upon the record as follows:

The board of commissioners were invoked by petition to exert their legislative power and discretion, and annex the territory in question to the city of Hammond. It refused to do so, without stating any reason therefor, or making any special finding, and dismissed the petition. An appeal was taken by the city and the case transferred to the Porter Circuit court. That court, with the assis tance of a jury, decreed the annexation of the territory to the city.

The annexation to a city of territory not platted, and without the consent of the owner or owners thereof being a legislative function, vested exclusively in the commissioners, the Porter Circuit court, in decreeing annexation, usurped a power and function which can only be exercised by the county board, and without the exercise of which territory of the above description cannot be annexed. It is too plain for argument that if that court had tried the case upon any or all of the jurisdictional facts involved, such as the sufficiency of the notice, contiguity of the lands, or whether they were unplatted or not, and found for the petitioner on any or all of these issues, it could not have rendered a valid decree of annexation, for that would be to dispense altogether with that legislative

discretion which the law has vested solely in the commissioners, and the exertion of which by them is a *sine qua non* to valid annexation in such cases. The decree of the Porter Circuit court is one which that court has no power, under any state of facts or circumstances, to make, unless, perhaps, in a case where the record showed that the commissioners had previously found that annexation ought to be made, but had denied it, for want, or supposed want of some jurisdictional fact or facts; but, of course, there can be no pretense that such a state of facts could be presumed in the absence of a record showing it.

Counsel, as we have seen, assert that it can, but we must regard their assertion, being entirely unsupported by authority, as wholly untenable, and not even properly debatable.

If we indulge in the presumption that the trial court assumed jurisdiction of the case in hand upon any fact or facts of judicial cognizance, then upon the finding of such fact or facts in favor of the petitioner, it was its plain duty under the statute to remand the case to the commissioners in order to enable them to exercise their discretion in the matter; but instead of doing so, the court in making a decree of annexation attempted the exercise of a power forbidden to it by the constitution.

The record of the commissioners is a part of the record of the Hammond case in the Supreme Court of Indiana.

That shows due notice of the filing of the petition and the allegation of all the jurisdictional facts. There can be no presumption, therefore, that the commissioners denied the petition for the want of any such fact or facts.

On the contrary the fair presumption must be, in the absence of any special finding to the contrary, that they exercised their discretion and denied the petition on the ground that it was not expedient to grant it, and that if they had found that it was expedient and proper to annex the territory, but that they had no power to do so for want of jurisdiction, the record would show that fact. Moreover, as there could be no appeal by the city from this decision of the commissioners so far as it was discretionary, but only so far as it was adverse upon issues of fact, it was incumbent upon the city, when it attempted to appeal, to bring itself within the law and to show that it had a right to appeal. That is to say, that the appeal was prayed for on the ground that a question of jurisdictional fact had been decided against it.

Suppose the law of Indiana, for instance, should provide for an appeal to the Circuit court from all decisions of justices of the peace, in which the amount in controversy should exceed $5. Would any one seriously contend that the Circuit court could take cognizance on appeal from a justice where the record did not show that more than $5 was in controversy, or that the Appellate court could render a valid judgment for $5 or less?

Here we deem it proper to submit to this court the following opinion of the late Hon. Lyman Trumbull upon the construction of section 4 of the act in force May 31, 1879, contained in his brief filed in the Circuit court of appeals.

"This act properly construed did not authorize the Porter Circuit court to finally determine that the territory in question should be annexed to the city of Hammond, otherwise the legislature was powerless to enact such section. The question of the construction of said 4th sec-

tion in this record is an open one, never having been presented to, much less passed upon by any court; but even had the Supreme court of Indiana construed the section in question as intended to authorize a Circuit court to finally determine affirmatively the question of annexation and affirm the power of the legislature to give such authority to the Circuit court, such decision would not be conclusive upon the federal courts, because whether any particular acts require the exercise of legislative or judicial power, and whether the legislative department can delegate any portion of its legislative function to the judiciary, are questions of general, not local law.

" What then is the proper construction of the 4th section of the act in question ?

" The 3d section provides that: ' The appeal shall be tried and determined as an original cause,' and the 4th section that: ' The court may make a final determination of the proceeding and compel its execution, or may send its decision to the board with directions how to proceed and require compliance.'

" Here is a statute by which a superior tribunal after hearing a matter *de novo* and having the power and being charged with the duty of obtaining all the light possible upon facts and the law in controversy is authorized to remand the matter to an inferior tribunal. What is the object of this peculiar provision ? Why, in any case or under any circumstances remand the cause ? What an utterly useless proceeding, *unless the inferior tribunal possesses some power not possessed by the Appellate tribunal?*

" We venture the assertion that no statute can be found similar to this one in the respect mentioned relat-

ing to matters in which the Appellate court has every power of final determination possessed by the tribunal appealed from.

"What is this power possessed by the board of commissioners and not by the Circuit court? Is it not the power to determine that annexation shall take place? Is not the power of final determination of the Circuit court confined to preventing annexation in cases where, in its opinion, the facts are not such as the statute requires before the board of commissioners can exercise their discretion in the matter?

"An illustration from the facts of this case may help to answer these questions.

"One of the matters in dispute was whether or not a certain strip of land had previously been annexed to East Chicago. Upon the decision of that question depended the fact whether or not the territory sought to be annexed in this case was contiguous to the city of Hammond, and therefore whether the Board had jurisdiction to act upon the petition of the city; whether said strip had been annexed to East Chicago involved questions both of fact and of law.

"Suppose now the Board held that such prior annexation had not taken place and that the territory in question ought to be annexed to Hammond, and, upon appeal, the Circuit court was of the opinion that the Board had wrongly determined the judicial question of the prior annexation to East Chicago. In such case the Circuit court would have power by the statute to make a final determination of the case, since the decision of the judicial question would necessarily end the matter by leaving the Board without jurisdiction to act. If, on the

contrary, the board held in this case that such annexation to East Chicago had taken place and therefore it was without power to grant the petition of the city of Hammond, and upon appeal the Circuit court was of the opinion that such prior annexation to East Chicago had not taken place, then, in such case, the power given to the court by the statute to remand the cause is sensible, but only sensible because the court cannot exercise the legislative discretion still involved. The court should therefore remand the cause to the Board, tell it that the matter was one within the authority delegated which it was the duty of the Board to investigate, direct it in the exercise of its best judgment to determine whether or not it was politically expedient that the city's petition should be granted. Let us suppose one more decision by the Board on the petition of the city.

"Suppose the board had decided every jurisdictional matter in favor of the city, and had said: 'The matter presented by this petition is clearly one upon which under the statute we are empowered to act, and we have therefore carefully examined into all the facts and circumstances, and exercised our best judgment in the matter, but we believe that for reasons of public policy, it is inexpedient and unwise, that the territory in question should be annexed to Hammond, and therefore refuse to grant the petition.' Is it not preposterous to contend that the power of review and reversal of such a determination of the board is an attribute of the judicial department, or to suppose that the legislature intended to give such power to review and over-ride such a determination to a jury of another county? As well submit to a jury the final determination whether the common council of Hammond shall meet at 7:30 or 8 P.M. From these considerations we conclude that the meaning of the statute is this:

"From the decision of the Board of Commissioners upon any proper subject of judicial inquiry, an appeal shall lie to the Circuit court. If the decision of that court upon the judicial questions involved leaves nothing upon which the board has, under the statute, power to act, then the court shall make its decision final. But, if the decision of the judicial questions leaves undetermined a question of political expediency as to the state of facts within the requirement of the statute, then the court shall remand the cause to the board for a determination of that political question, and, if necessary, may require the board to pass upon such political question. The statute has never been construed as to the point in question. A decision that an appeal lies from the board to the Circuit court in any particular case, is simply a construction so far as it applies to the particular appeal passed upon, and even a decision upholding the constitutionality of the law does not touch this question. Properly construed the law may be constitutional. The question whether upon an appeal from the Board of Commissioners refusing annexation, the Circuit court has power itself to make the annexation has, we believe, never been before the Supreme court of Indiana. Certainly there is nothing in any of the published opinions of that court to indicate that its mind has been brought to consider these questions. In the language of the Supreme court of the United States, in *Woodruff* v. *Parham*, 8 Wall., 138: 'We take it to be a sound principle that no proposition of law can be said to be overruled by a court which was not in the mind of the court when the decision was made.'

Burgess v. *Seligman*, 107 U. S., 83.

"A decision of the highest court of Indiana, if such there

were, construing the statute in question, as conferring upon the Circuit court authority itself to make the annexation in question would not be binding upon the Federal court, because whether the statute so construed would be within the power of the legislature to enact, would depend upon whether the authority exercised by the Circuit court was of a legislative or a judicial character—a question of general and not local law."

See *Carroll Co.* v. *Smith*, 111 U. S., 560.

"The judgment of the Porter Circuit court annexing the territory in question to Hammond is void for the reason that said Circuit court had no jurisdiction to annex territory. Its jurisdiction, if any, over the subject of annexation was limited to the determination whether the facts existed that would warrant the Board of County Commissioners in making said annexation."

This opinion we believe to be sound throughout and the true and lawyer-like construction of the statute in question.

The cases cited by counsel under the assignment of error in question need no particular examination or review. They simply lay down the familiar rule that the judgment of courts of competent jurisdiction are not subject to collateral attack and that where their jurisdiction depends upon the existence of certain facts, their assumption of jurisdiction is equivalent to a finding that such jurisdictional facts exist and if the court erred in assuming jurisdiction, no advantage can be taken of such error or appeal.

We will select a few of these cases as fair samples of the whole to illustrate their inapplicability to the case in hand.

In *Donahue (Dorham)* v. *Springfield Hardware Co.*, 10 C. C. A., 294, judgment had been rendered for less than $2,000, after the act of March 3, 1887, limiting the jurisdiction of the Federal Circuit courts to matters exceeding $2,000 went into force, but the complaint was filed before the act was passed by Congress. The summons was issued when the complaint was filed and delivered to plaintiff's attorney, who delivered it to the marshal March 23, 1887. The summons was served personally, but defendant made default. The court says:

"The court had jurisdiction of the person of the defendant. It, therefore, had jurisdiction to determine the question whether the suit was commenced before or after the passage of the act of March 3, 1887, and whether the complaint stated a cause of action within the jurisdiction of the court."

Its erroneous decision of any or all of these questions would not affect the jurisdiction of the court over the cause.

Evers v. *Watson*, 156 U. S., 527, was a case in which the court might have had jurisdiction over the party. It was held that after the final decree, even if jurisdiction had not been apparent on the face of the record, advantage could not be taken of it in a collateral proceeding.

The contention was that the record did not show jurisdiction over the party.

In *Dowell* v. *Applegate*, 152 U. S., 327, the contention was that the ground on which the Federal court assumed jurisdiction was insufficient in law to make the case one arising under the laws of the United States.

The court say: "But that was a question which the Circuit court was competent to determine in the first instance. Its determination of it was the exercise of the jurisdiction."

"Even if that court erred in entertaining jurisdiction, its determination of that matter was conclusive upon the parties before it, and could not be questioned by them or either of them collaterally or otherwise than on a writ of error or appeal to this court."

It appeared from the face of the record that the case depended in part upon the construction of certain provisions of the Internal Revenue act.

Where the lack of jurisdiction goes only to the sufficiency of the service, or, as in the Little Rock case, to the sufficiency of the affidavit on which constructive notice is based, then there is no doubt that the judgments of the courts of superior jurisdiction are not open to collateral attack. They may be erroneous, but not void. But where there is an absolute want of jurisdiction over the subject-matter, or an absolute want of power in the court to decree what it has attempted to decree, it is most indubitably the law that such attempted decree may be regarded and treated everywhere and by everybody as an absolute nullity. To contend that such a decree could not be collaterally attacked is manifestly absurd.

Suppose an action of libel or slander, or an action of ejectment should be brought before a court from whose jurisdiction such matters had been expressly excluded by law, and the courts should proceed and try the case and render judgment against the defendant for damages, would any one pretend that such judgment was not void upon its face, and open to collateral attack?

Suppose again that an action should be brought in a court of general jurisdiction upon a contract, and a court should render judgment against the defendant, that he be imprisoned until the debt be paid.

Here, although the court had jurisdiction over the person and of the subject-matter of the suit, it had no power to render such a judgment, and the same would, of course, be treated by all other courts as an absolute nullity.

V.

The third error assigned by petitioner is this:

"The validity of annexation as between the parties of this record became *res judicata* by the decisions of the state court, and it is error to treat it herein as *res integra*."

This proposition of counsel on the other side devolves upon them the necessity of showing that the Porter Circuit court acted within the scope of its authority in making the decree of annexation. This they do not attempt to do. The idea that the decree of a court which such court is absolutely devoid of power to make, and which can only be made by the exercise of legislative power, can operate as *res adjudicata* is, to say the least, novel.

It could subserve no useful purpose to review the cases cited under this head. We have examined them all, as well as those cited under the two preceding heads, and find them at first blush not at all in point and wholly inapplicable except upon the assumption that the Porter Circuit court had complete jurisdiction both of the subject-matter and of the persons before it, and full power to decree an annexation after it had been denied by the county commissioners.

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VI.

The fourth assignment of error is in substance that the decision of the Supreme court of Indiana in *Forsyth et al.* v. *Hammond*, and construing the statutes and constitution of that state, should have been followed in the Federal court, and the court erred in refusing to be bound thereby.

In the first place, it is to be observed that the court, in said case, did not construe the statutes and constitution of Indiana, and that no question of the construction of said statutes and constitution was before the court, as will be apparent from an examination of Exhibits A and B, pages 11 to 29, inclusive, attached to the petition herein.

The cases cited by counsel under this head of their brief do not support their broad proposition. From such of these cases as are seemingly applicable, and other Federal decisions, we deduce the following general rule:

1. Section 34 of the Judiciary Act of September 24, 1789, limits the application of the state laws as rules of decision in Federal courts to the following clause:

"Trials at common law in cases where they apply." It does not apply, therefore, to cases in equity as to which the jurisdiction of the Federal courts is derived from the constitution and laws of the United States, and is uniform throughout all the states, and cannot be affected by state laws.

Robinson v. *Campbell*, 3 Wheat., 212.
U. S. v. *Holland*, 4 Wheat., 108.
Neves v *Scott*, 13 How., 268.
Newnon v. *Lee*, 2 Black, 499.

2. Where decisions, whether founded on a statute or not, have become rules of property as laid down by the highest court of a state, viz.: the rules, governing the descent, transfer or sale of property, and those which affect the title and possession thereof, they are to be treated as laws of the state by the Federal courts in trials at common law, *but where the law has not been thus settled*, it is the right and duty of the Federal courts to exercise their own judgment as they also always do.

3. The Federal courts have an independent jurisdiction in the administration of the state laws co-ordinate with and not subordinate to that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of these laws. The unvarying rule is that in matters of general law the federal courts always exercise an independent judgment.

Burgess v. *Seligman*, 107 U. S., 32.
Railroad Company v. *Baugh*, 149 U. S., 368.

4. If there is no decision of a state court on the interpretation of a statute, and nothing on which to found a practical construction, or if the decisions of the state courts are conflicting and the interpretation unsettled, the federal courts must decide on the true construction.

Gardner v. *Collins*, 2 Peters, 58.
Sohn v. *Watterson*, 17 Wall., 596.
Railroad Company v. *Orton*, 32 Fed., 457.
Burgess v. *Seligman*, *supra*, page 20.

5. Where a question is first raised in the Federal court and has there been decided, neither the Circuit court on bill of review, nor the Supreme court on appeal, will reverse that decision contrary to its own conviction, to conform to a state decision made in the meantime.

Pease v. *Peck*, 18 How., 599.
Town of Roberts v. *Bolles*, 101 U.S., 119.

The principal question here involved was first raised in the Federal Circuit court. It was not raised in the Supreme court of Indiana until after the bill in this case was filed, and the question was not decided by that court until the decision of the Circuit Court of Appeals in this case had been in fact made.

See Exhibit C, page 87, at bottom of page of petition herein.

Moreover, this is a case in equity. The federal statute of 1789 does not apply to it. The federal courts may, and probably will, follow the decisions of the state courts if there be doubt whether such decisions are right or not, but if in the judgment of a federal court they are clearly wrong, then such court can not conscientiously adopt them, and it is bound to disregard them.

Litigants in the federal courts have a constitutional right to the conscientious opinion and judgment of such courts, otherwise the federal judiciary would be a mere mockery. All the authorities are agreed that in matters of general law the federal courts, even in trials at common law, are not bound by the decisions of the state courts. The cardinal question involved in this case is, Did the Porter Circuit court, in making a decree of an-

nexation, attempt the exercise of a legislative power? The decision of this question in the affimative determines the whole case. What is a legislative power depends upon no local law. Its decision depends upon general reasoning and legal analogies, and not upon local laws. It is as clearly a question of general law as could possibly arise in my case.

VII.

The Circuit Court of Appeals ought not to have followed the opinion and decision of the Supreme Court of Indiana in Forsyth v. Hammond for the following reasons:

1st. That decision is in direct conflict with the weight and current of authority on the subject of annexation.

See cases cited in Mr. Miller's brief herein.

See also *Minn.* v. *Simons*, 32 Minn., 54.

This case is a very strong one in support of the opinion of the Circuit court of Appeals in this case. The Minnesota statute provided:

"If the court, after such hearing, shall be satisfied of the correctness of such survey, and of the legality of said plats, and that all the requirements of the statutes have been complied with; that the lands embraced within such petition * * * ought justly to be included in the said proposed village; that the interest of the inhabitants will be promoted thereby, it shall make an order declaring such territory, etc., * * * which may be enlarged or diminished by such court as justice may require."

On page 542, the court remarks:

"It will be observed that under the provisions of this

act, the legislature has not, except as to certain preliminaries, determined or defined the facts or things upon the existence of which the territory shall be incorporated.

"It will also be observed that the duty of the court is not simply to inquire and ascertain whether certain specified facts exist, or whether certain specified conditions have been complied with, but to proceed and determine whether the interests of the inhabitants will be promoted by the incorporation of the village, and if so, what land ought in justice to be included within its limits. In short, it is left to the court to decide whether public interests will be subserved by creating a municipal corporation, and the determination of this question is left wholly to its views of expediency and public policy".

That the determination of such questions involves the exercise of purely and exclusively legislative power seems to us too clear to admit of argument.

On page 543 the court says: "Had the legislature by the act in question fixed and specified all the conditions and facts upon which the incorporation of certain territory should depend, we do not question their right to refer to some tribunal or body the question of ascertaining and determining the existence of these facts and conditions. Neither do we decide that they might not delegate certain legislative powers regarding the organization and incorporation of villages to some appropriate municipal body which might constitutionally exercise local legislative power. * * * Boards of county commissioners are already under certain limitations invested with somewhat similar power in the organization and change of boundaries of towns and school districts, but the present act assumes to dele-

gate these legislative powers to the District court—a tribunal not authorized to exercise them, its jurisdiction under the constitution being purely *judicial.*"

The decision of the Supreme court of Wisconsin at its last term is also a strong case directly in favor of our contention. As it probably has not yet been officially published, we make the following copious quotations from a copy of the opinion furnished us by the clerk of said court.

IN THE MATTER OF THE APPLICATION FOR THE INCORPORATION OF THE VILLAGE OF NORTH MILWAUKEE.

WINSLOW, J.: This is an appeal from an order incorporating the village of North Milwaukee, and appointing inspectors of election therein, made by the Circuit court of Milwaukee county, under the provisions of section 861 S. & B. Anno. Statutes. The order was made upon due petition and after due notice of hearing, and certain taxpayers and residents of the territory sought to be incorporated, have duly appealed from the order and claim that it is void because, in making such order, the Circuit court performed a legislative function, and that the sections of the statute authorizing the making of such order are for that reason unconstitutional. This is the only question in the case that we find it necessary to consider.

The sections of the statute which authorize the proceeding in question are sections 854 to 866, inclusive, S. & B. Anno. Stat., and they may be summarized as follows: Section 854 provides that any part of any town or towns not less than one-half mile in area, and not included in any village, all lying in the same county, containing a resident population not less than three hundred,

or territory situated as above described, not less than one square mile in area, containing a resident population of four hundred or upwards to each square mile, may, upon compliance with the conditions of this chapter, become incorporated as a village, etc. Section 855 provides that the persons intending to make the application for incorporation shall cause to be made an accurate survey and map of the territory proposed for such village, showing the courses and distances of the boundaries and quantity of land contained therein. The accuracy of the survey and map shall be verified. They shall also cause to be made an accurate census of the resident population of such territory as it may be on some day not more than ten weeks previous to the time of application. Section 856. The map, survey and census shall be left at some place in such territory for inspection and examination at all reasonable hours, by any person interested, for five weeks from the posting of the first notice of application. Sections 857–8. The intending applicants shall give notice, which shall be posted in public places and published for six weeks prior to date of hearing, that they will apply to the Circuit court for an order incorporating the territory described in such notice as a village; such notice shall also contain a reference to place where map, survey and census may be examined. Section 859. The application shall be signed by not less than five taxpayers and residents of the territory, and shall set forth the boundaries of the territory, population, etc. Section 860 provides that the court shall hear all parties interested for or against such application who shall reasonably appear, may adjourn such hearing, direct a re-survey to be made or new census to be taken, etc. Section 861 provides: "If the court after such

hearing shall be satisfied of the correctness of any such survey or re-survey and census, that all the requirements of the statute have been complied with; *that the lands embraced in such territory or any part thereof ought justly to be included in the proposed village; that the interest of the inhabitants will be promoted by such incorporation;* and that such territory as ought to be included contained, at the time such census was first or subsequently taken, the population, in number and in proportion to the quantity of land therein, required in section 854, it shall make an order declaring that such territory, the boundaries of which shall therein be set forth by courses and distances, *and which may be enlarged or diminished by such court from the boundaries specified in such application, as justice may require*, shall be an incorporated village by the name specified in such application, or by such other name as the court shall deem proper, if the electors thereof shall assent thereto as hereinafter provided." It also provides that the order shall appoint three persons to act as inspectors of election. Sections 862–3–4 provide that such inspectors shall give notice of election to be held in such territory to determine if such territory shall be incorporated, and for notice of such election and for filling vacancies in such board of inspectors. Sections 865–6 provide for the canvass of the vote on such election, and in case the proposition is carried, for the filing and recording of the petition, order of the court and all papers, together with the result of such election, with the register of deeds, and that they shall be recorded at length within ten days after such election, and that the inhabitants shall, from the time of the recording of the order of the court aforesaid, be deemed a body corporate. The court found in making the order ap-

pealed from, among other things, that "the lands embraced in said territory *ought justly* to be included within the proposed village, *and that the interests of the inhabitants would be promoted by such incorporation.*"

As before stated, the claim of the appellants is that these powers attempted to be conferred upon the Circuit court are legislative and political powers, and that they cannot, under our constitution, be conferred upon a court.

In approaching the question it will be well to first quote the constitutional provisions which have any legitimate bearing on it.

By Section 1 of Article IV it is provided that the legislative power shall be vested in a senate and assembly.

By Section 3 of Article XI it is made the duty of the "legislature" to provide for the organization of cities and incorporated villages.

By Section 31 of Article IV the legislature is prohibited from enacting any special or private law "for incorporating any town or village;" and by Section 32 of the same article it is provided that the legislature shall provide general laws for the transaction of any business prohibited by Section 31 aforesaid.

By Section 22 of Article IV it is provided that the legislature may confer upon the various county boards of supervisors of the state such powers of a local *legislative* and administrative character as they shall from time to time prescribe.

By Section 2 of Article VII the *judicial power* of the state is vested in certain courts, of which the Circuit court is one, and by Section 8 of the same article the jurisdiction of the Circuit courts is laid down. This last

named section may profitably be inserted here; it reads as follows : " The Circuit courts shall have original jurisdiction in all matters, civil and criminal, within the state, not excepted in this constitution, and not hereafter prohibited by law; and appellate jurisdiction from all inferior courts and tribunals, and a supervisory control over the same. They shall also have the power to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, and all other writs necessary to carry into effect their orders, judgments and decrees, and give them a general control over inferior courts and jurisdictions."

In this country a corporation can only be created by *legislative* enactment. 1 Dillon Mun. Corp., 4th ed., Sec. 37. Starting with this unquestioned general proposition several plain and simple deductions may be made from the above quoted constitutional provisions which are not really contested in this case. These deductions are : 1st. That villages *must* be *created* by act of the legislature and not by the courts; 2d. That they must be created under the terms of a general law and not by special act; 3d. That the legislature may delegate local legislative and administrative powers to county boards of supervisors and to no other officer or body, save in so far as it may delegate powers of local self government to municipal corporations; 4th. That the Circuit court under the constitution is purely a *judicial* court. All of these propositions seem to us so plain as to require no argument in their support.

This brings us naturally to the simple and only question in this case, namely: does the law before us go into operation upon the happening of a certain state of facts to be determined by the Circuit court, or does it authorize and require the court to go further and not only de-

termine facts, but pass its judgment upon questions of legislative discretion? If the first branch of this question can be answered in the affirmative and the latter branch in the negative, then the law must be sustained, because the ascertainment and determination of questions of fact is clearly an exercise of purely judicial power; if, on the other hand, the latter branch of the question must be answered in the affirmative, then the law cannot be sustained, because such power cannot be delegated to the Circuit court under our constitution.

There are a number of questions upon which the court is required to pass when making the preliminary order of incorporation under Sec. 861, R. S., which are unquestionably pure questions of fact: such questions as to whether the survey is correct, whether the census is correct, whether the population is as large as the statute requires in proportion to the area, and whether the statutory requirements have been complied with, are all questions of fact, and no reason is perceived why the court may not properly be authorized to inquire into and determine these facts, nor why it may not order an election and appoint inspectors. But the other questions upon which the court is required to pass are of a different nature, and we see no escape from the conclusion that in passing upon and deciding them the Circuit court determines legislative or political questions. These questions are: (1) Whether the lands embraced in the petition *ought justly* to be included in the village; and (2) whether the interest of the inhabitants will be promoted by such incorporation. Furthermore, the provision authorizing the court to enlarge or diminish the boundaries of the village as *justice may require* seems to us equally an exercise of legislative power. It is vigorously claimed by the

respondents that these last named questions are in truth questions of fact only, but it seems to us that this claim is utterly untenable. There is noproper sense in which they can be said to be questions of facts. They are rather ultimate conclusions from all the facts. Given all the facts which the legislature require; the area, the population, the census, the map, the notices, and does the order calling an election follow? By no means. The Circuit court, in addition to determining these facts must then say whether in its judgments it is *best* that there should be a village. This is no true question of fact; it is a mental conclusion which may be based alone on the previous bias of the mind of the presiding judge as to the expediency of a small settlement assuming corporate powers and obligations. A circuit judge could prevent the formation of a single new village in his entire circuit notwithstanding every requisite condition of fact were present, simply because he believed that it was really best for small communities to remain unincorporated. It is very plain to us that this belief or conclusion of mind of the circuit judge is not a future event or fact or state of facts upon which a law may be properly made to depend. The sum and substance of the law is this: Villages may be incorporated *if the Circuit Court thinks best.* This amounts to nothing more nor less than the vesting in the Circuit Court of the powers of a third house of the legislature, which must be exercised in the affirmative before a village can exist. The legislature has passed the law, the governor has signed it and it has gone on the statute book, but the circuit judge in every case must add his concurrence before it is operative. The question as to whether incorporation is for the best interest of the community in any case is emphatically a question of pub-

lic policy and state craft, not in any sense a judicial question, and in attempting to submit that question to the decision of the Circuit court the legislature has undoubtedly done that which the constitution forbids. If the decision of that question is to be delegated to any officer or body it must certainly be to the county boards of supervisors.

That part of the section also which places the whole question of the boundaries of the proposed village under the control of the court is equally objectionable. This also vests in the court without appeal the decision of the entire question as to what territory and consequently what people shall comprise the new village. Here again the court must decide the question of political expediency which is very plainly a question to be decided by the legislative branch of the government alone.

In conformity with the views here expressed will be found a number of decisions of courts of last resort in various states.

Shumway v. *Bennett*, 29 Mich., 451; *State ex rel.* v. *Simons*, 21 N. W. Rep., 750 (Minn.); *Galesburg* v. *Hawkinson*, 75 Ill., 153; *State* v. *Armstrong*, 3 Sneed, 634; *Territory ex rel.* v. *Stewart* (Wash.) 29 A. & E. Cor. Cases, 22; *People* v. *Nevada*, 6 Cal., 143; *People* v. *Carpenter*, 24 N. Y., 86.

The principles we hold in this case are simple: (1) The creation of municipal corporations is the exercise of legislative power; (2) legislative power cannot be delegated save as authorized by the constitution itself; (3) the Circuit court, under the constitution, is purely a judicial court, and is not authorized to receive or exercise legislative powers of any kind; (4) the act of determin-

ing, either tentatively or finally, whether it is for the best interest of the people that they should be incorporated into a village and fixing the boundaries, is not the determination of a mere question of fact, but is the exercise of legislative discretion, and if such power be delegated at all it must be delegated to the proper bodies named in the constitution.

See, also, opinion of Judge Howard of the Supreme court of Indiana, set forth in Exhibit B, on pages 22, 23, *et seq.*, wherein he concedes that annexation of territory to a city is a legislative function.

2d. Said decision is in direct conflict with a long line of decisions of the same court on the subject of appeals from discretionary decisions of the county commissioners.

Hannah v. *Board*, 29 Ind., 170.
Hoffat v. *State*, 40 Ind., 220.
City of Ft. Wayne v. *Cody*, 43 Ind., 200.
Alexander v. *Gravel Road Co.*, 44 Ind., 430.
Grusenmeyer v. *City of Logansport*, 76 Ind., 549.
Catterlin v. *City of Frankfort*, 87 Ind., 45.
Hunt v. *State*, 93 Ind., 311.
Platter v. *Board*, 103 Ind., 360–374.
Waller v. *Wood*, 101 Ind., 139.
Farley v. *Board*, 126 Ind., 468.
Bunnell v. *Board*, 124 Ind., 1.
State v. *Board*, 131 Ind., 90.

All these cases hold that no appeal will lie from decisions which are within the discretion of the board, and

this is also necessarily implied from the *dictum* of Judge Woods in the Grusenmeyer case:

Now, if there ever was a statute granting to the county commissioners discretionary power, the statute providing for annexation to cities in certain cases, most certainly confers upon them such discretionary power. If the language of the statute does not clearly and indubitably confer such power, then there are no terms in the English language by which such power can, or could be conferred beyond cavil or doubt. The question whether this statute confers discretionary power or not is, in our opinion, not open to legitimate debate.

Yet, without noticing the plain and unmistakable words of the statute, or the cases above cited, and which were cited in the brief for rehearing in the Supreme court of Indiana, or without even denying that the language of the statute confers a discretionary power, the learned judge proceeds to a conclusion in direct conflict with the language of the statute, and with all the cases above cited.

It might just as well be contended that the decisions of the county board in relation to the building of court houses, county asylums for the poor, the cost thereof, could be appealed from, taken to the Circuit court, transferred to another county, and there be determined by a court and jury as that the decisions of such board in which they have refused to exercise their discretion to annex territory to a city could be so appealed from, and determined in like manner.

3d. Said decision is also in direct conflict with a long line of decisions of the same court, and with the common law on the subject of collateral attack.

It is a thoroughly well settled principle in every tribunal governed by the rules of the common law, that the proceedings of municipal corporations, acting within the scope of their statutory authority, cannot be collaterally impeached or assailed for error or irregularity by evidence *dehors* the record of such proceedings to show the existence of some jurisdictional fact.

Yet this is precisely what the trial court (Porter Circuit court) allowed to be done and the question having been properly presented in the Supreme court that court held there was no error. On the trial the appellants (remonstrants below) give in evidence a record of the common council of the city of East Chicago showing that before the city of Hammond had presented its petition to the county board of the city of East Chicago had with the written consent of the owner, the Calumet Canal and Improvement Company, by resolution annexed to that city a strip of land about a quarter of a mile wide and extending from the northern and western boundaries of said city westwardly to the state line. The effect of this annexation was to defeat the Hammond petition for it covered all the land in the territory sought to be annexed by Hammond that was contiguous to its city limits, and thereby cut off and destroyed the contiguity of the remaining territory sought by Hammond to be annexed. These proceedings of the common council of East Chicago were had in pursuance of Sec. 3, 196, R. S., 1888, as much of which as affects the case is as follows: "The limits of any city may be extended over any lands or

contiguous territory by the consent of the owner thereof in writing, and a resolution of the common council passed by a two-thirds vote, extending the limits of said city over such lands or territory; which written consent and resolution shall be entered at length in the records of such city; and the common council shall cause a certified copy of both to be recorded in the recorder's office of the proper county." No objection was made to the regularity of these proceedings, but the trial court over the objection of appellee allowed the appellant to give in evidence for the purpose of impeaching said record of East Chicago certain deeds from the Improvement Company aforesaid to the Chicago and Calumet Terminal Railway Company, conveying a right of way 100 feet wide, and extending north and south entirely over and across the strip of land annexed to East Chicago. These deeds were executed before the said annexation to East Chicago was made. The said Terminal Railway Company did not file its written consent to such annexation. For this reason the Supreme court held that the annexation proceedings of the council of East Chicago were void, and that the court below committed no error in allowing said deeds to be read in evidence. In other words, the Supreme court held in effect that the record of the common council of East Chicago was subject to attack and impeachment in a collateral proceeding by evidence not only outside of the record, but in contradiction of it. That this was error we conclusively showed and demonstrated in our brief on petition for rehearing in the Supreme court of Indiana, as we think will clearly appear from the quotations of so much of it as is pertinent, which we here subjoin:

"In the first place, we desire to recall the attention of

the court to the precise question before it, and that is: Can the record of the common council of the city of East Chicago, annexing certain territory, being perfectly regular and showing all essential jurisdictional facts upon its face, be collaterally impeached? The opinion answers this question in the affirmative. There is no other postulate upon which it can stand for a moment. But it is indisputably the law of this court, as established by a long and increasing line of cases, that the records of inferior tribunals, such as common councils, county boards, etc., showing all essential jurisdictional facts upon their face, are upon the same footing as the records of Superior courts, and cannot be collaterally attacked."

Featherstone v. *Small*, 77 Ind., 143.
Stoddard v. *Johnston*, 75 Ind., 20.
Argo v. *Barthond*, 80 Ind., 63.
Wilkinson v. *Moore*, 79 Ind., 397 (400).

In *Featherstone* v. *Small*, *supra*, Woods, J., says:

"The judgment of an inferior court upon a matter "which it has acquired a right to pass judgment upon is "as conclusive as the judgment of a court of general ju- "risdiction."

It is equally indisputable law that facts which must have been considered and adjudged by such inferior tribunals, in order to take the proper action in any given case, will be presumed to have been considered and adjudged by them, and if their action is necessarily predicated upon the existence of such facts, or rather upon the finding of their existence, such finding cannot be questioned in any collateral proceeding.

Board v. *Hall*, 70 Ind., 469.
Brocaw v. *Board*, 73 Ind., 543.

Ricketts v. *Spraker*, 77 Ind., 372 (374).
State v. *Wentzel*, 77 Ind., 428 (436).
South v. *Woods*, 79 Ind., 108.

In *State* v. *Wentzel*, *supra*, ELLIOTT, C. J., on page 436, says:

"It has been again and again decided that the judgment of an inferior court upon its own right to take jurisdiction cannot be collaterally questioned."

It may further be laid down as an unquestioned rule that proceedings only authorized by statute, and not in accord with the course of the common law, though pending in courts of general jurisdiction, are special, and judgments rendered or orders made therein stand upon the same footing as those of tribunals of inferior jurisdiction.

Denning v. *Corwin*, 11 Wend., 648.
Sharp v. *Speir*, 4 Hill, 76.
Striker v. *Kelly*, 7 Hill, 9.
Phalter v. *Powell*, 6 Wheaton, 119.

Whatever presumptions, therefore, which prevail in respect to the jurisdiction of the former in statutory and special cases will also prevail in respect to the jurisdiction of the latter.

It may further be laid down as an undeniable proposition that common councils of cities have jurisdiction of the general subject of annexing territory by and with the consent of the owner or owners thereof.

Now the case presented by the record may be fairly and briefly stated thus:

A petition or written consent was laid before the common council of East Chicago, in which it was alleged

that certain lands therein described belonged to the petitioner; that they were unplatted, and that the petitioner desired to have them annexed to said city. Thereupon it became and was not only the right, but the duty of that body to ascertain and determine whether the subscriber of the petition or written consent was the owner of the lands sought to be annexed. It proceeded to do so, and that question must necessarily have been found in the affirmative, for that body granted the prayer of the petition, passed a resolution by a more than two-thirds vote extending the limits of the city over such lands, and caused such petition and resolution to be entered at length in the records of said city, and a certified copy thereof to be recorded in the recorder's office of the county. This action was necessarily predicated upon the finding of the council that the title to said lands was in the petitioner. That question, therefore, under the authorities was as effectively adjudicated as any question can possibly be adjudicated by a common council. That body had the lawful power to pass judgment upon its own right to take jurisdiction. It did so, and therefore, its judgment is just as conclusive as against collateral attack as the judgment of a court of general jurisdiction. But the opinion holds directly the reverse. The opinion virtually holds that although the petition legally presented to the common council the question of the ownership of the lands therein described, and that that body adjudicated that question by annexing such lands, yet that same question remained open to collateral investigation, and the city of Hammond having no title or interest, legal or equitable, to or in said lands, or any part thereof, without plea or answer either before the commissioners or in the Circuit court, had the right to show that the question of ownership had

not been *rightly* adjudicated, and for that purpose to introduce evidence to show that the title to a right of way or some other interest in a small strip of said lands was vested in the Chicago and Calumet Terminal Railway Company, a party making no complaint or objection on account of such annexation, and we may add (if we may be indulged in so much *obiter*) a party that never will complain thereof, for it has given its consent thereto in writing.

The case of the *Evansville Railroad Company* v. *The City of Evansville*, 15 Indiana, 395 (416), which has been cited and approved in more than forty subsequent decisions of this court, is in its facts closely analogous to the case at bar, and settled a principle entirely applicable here. That was a suit by the railroad company against the city upon a stock subscription. There was a plea or answer, in which it was alleged that the petition to the common council praying for the subscription was signed by less than the requisite number of the freeholders of the city. To this there was a replication that the common council, being lawfully convened, determined and decided that, by petitions then and there presented, more than two-thirds and about five-sixths of the resident freeholders of the city had petitioned for the subscription, whereupon it was ordered by the common council that the petition be granted and the subscription made. To this replication a demurrer was sustained in the court below, but this court held the replication to be good, reversed the case, and ordered the demurrer to be overruled. Worden, J., in delivering the opinion of the court, said: "The question arises, whose duty was it to determine whether the requisite number of the freeholders of the city had petitioned for the subscription? We

think it clear that that duty pertained to the common council, no other tribunal having been provided for that purpose. * * * It is a fact conceded by the paragraph of the answer in question, that a petition of certain freeholders of the city asking for the subscription was laid before the common council. It thereby became the right and the duty of that body to determine whether the subscription was petitioned for by the requisite number of the proper persons in order to authorize the subscription, and having passed upon that question, their determination in the premises would seem to be conclusive. In order to give the common council power to subscribe it is necessary that a certain portion of certain persons should have petitioned therefor, but the common council are to judge of the proportion and qualifications of the persons petitioning, and their judgment in that respect is conclusive, unless indeed it may be set aside by some direct proceeding for that purpose. It is a well settled principle that where the jurisdiction of an inferior court depends upon a fact which such court is required to ascertain and settle by its decision, such decision is conclusive."

Citing :

Brittain v. *Kinnaird*, 1 Brod. & Bing., 432.

Betts v. *Bagley*, 12 Pick., 572.

Martin v. *Mott*, 12 Wheat., 19.

Vanderhoyden v. *Young*, 11 John., 150.

Birdsall v. *Phillips*, 17 Wend., 464.

Ex parte Watkins, 3 Pet., 193.

People v. *City of Rochester*, 21 Barb., 656.

Let us now apply the principle established by these cases, and their very language *mutatis mutandis* to the case in hand. The right of the common council to act in execution of their authority to annex lands not platted, is based upon the written consent of the owner or owners thereof, and for them to have acted in this particular case without first ascertaining whether the petitioner was the owner of the lands sought to be annexed would have been a clear violation of duty, and the ascertainment of that fact was necessarily left to the inquiry and judgment of the common council itself, as no other tribunal was provided for that purpose. It is a conceded fact in the case that a petition consenting to the annexation of certain lands, subscribed by a party claiming to be the owner thereof, was laid before the common council. It thereupon became the right and duty of that body to determine whether the petition or written consent were signed by the proper person or persons in order to authorize the annexation, and having passed upon that question their determination in the premises is conclusive. If the petitioner owned all the land described in its petition, or, in other words, if the averment of that fact in the petition were true, it is admitted that the annexation would be valid, but it is said that in order to give the common council jurisdiction to annex, the petitinner must be the owner of the lands. That is very true, but that was a matter of fact to be made out before the common council, and on which they were to draw their own conclusion. They were bound to inquire, and found that the petitioner was the owner of all said lands. However erroneous such finding may be, it is nevertheless binding and conclusive as against collateral attack.

It was not necessary for the common council to enter a formal order declaring that it had jurisdiction of the case, or that all jurisdictional facts had been shown. The order of annexation was a sufficient declaration of jurisdiction, for the assumption of authority is an assertion of jurisdiction without any formal statement of the facts essential to give jurisdiction.

Bell v. *Maish*, 137 Ind., 226.
Osborne v. *Sutton*, 108 Ind., 443 (445).
Pickering v. *State*, 106 Ind., 228.
Jackson v. *State*, 104 Ind., 516.
Carr v. *State*, 103 Ind., 548.
Platter v. *Board*, 103 Ind., 360.
Cadwell v. *Curry*, 93 Ind., 363.
Stoddard v. *Johnson*, 75 Ind., 20.

The power to hear and determine is jurisdiction. It is *coram judice* whenever a case is presented which brings this power into action. If the petitioner states such a case that upon demurrer the court would render judgment in his favor, it is an undoubted case of jurisdiction. Whether on an answer denying and putting in issue the allegations of the petition, the petitioner makes out his case, is the exercise of jurisdiction conferred by the filing of a petition containing all the requisites and in the manner prescribed by law.

U. S. Arredondo, 6 Pet., 709.

In order to more clearly show the inconsistency and conflict of the opinion in this case on the question under consideration with many former decisions of this court on the same question, we here subjoin in juxtaposition some of the strictly logical sequences which may be legitimately drawn from the one and from the other.

Where the jurisdiction of an inferior tribunal depends upon a fact, which such tribunal is required to ascertain and settle by its decision, such decision is conclusive. *Evansville Railroad Co.* v. *City of Evansville*, 15 Ind., 395; *Stoddard* v. *Johnson*, 75 Ind., 20.

Where the jurisdiction of an inferior tribunal depends upon a fact, which such tribunal is required to ascertain and settle by its decision, such decision is *not* conclusive but may be inquired into in a collateral proceeding, and upon proof that such jurisdictional fact did not exist, the judgment or order of such inferior tribunal may be regarded and treated as a nullity. Opinion in *Forsyth* v. *Hammond*, now under consideration.

The objection that a petition to a county board is not signed by the requisite number of free holders cannot be successfully made after the board has adjudicated that question. It is too late to present the objection that there was not a sufficient number of qualified petitioners after the report of viewers has been approved. *Osborne* v. *Sutton*, 108 Ind., 443.

But the objection that a petition presented to the common council of a city for the annexation of certain lands is not subscribed by all the owners of the land therein described can be successfully made collaterally after the common council has adjudicated that question, even by one not an owner of any of the lands or of any interest therein. *Ibid.*

It has long been the rule in this state that when a court is required to determine whether facts essential to jurisdiction exist, a judgment necessarily implying their existence will be conclusive as against a collateral attack. *Jackson* v. *State*, 104 Ind., 517.

Although when a petition for the annexation of territory is presented to a common council, it becomes its duty to determine whether facts exist, yet its order implying their existence is not conclusive as against a collateral attack. *Ibid.*

It is not necessary for an inferior tribunal to enter a formal order declaring that it has jurisdiction of the case, or that all jurisdictional facts have been shown. A general order is a sufficient declaration of jurisdiction, for the assumption of authority is an assertion of jurisdiction without any formal statement of the facts essential to give jurisdiction. (*Osborne* v. *Sutton*, 108 Ind., 445.)

The assumption of authority by the common council in proceeding to pass the resolution for the annexation of the territory was not such an assertion of jurisdiction as dispensed with a formal finding of the jurisdictional fact of ownership in the petitioner, and even if that fact had been specially found by said council, such finding would still remain open to impeachment in a collateral proceeding by a party owning no interest in said land. (*Ibid.*)

When there is an assumption of jurisdiction and an order made in pursuance of a statute, there jurisdictional questions have been adjudicated, and they cannot be re-adjudicated in a collateral proceeding. (*Jackson* v. *State*, 104 Ind., 520.)

Then presentation of a petition to the County Board under Sec. 11, R. S., 1876, p. 736, calls into exercise the jurisdiction of that body and authorizes it to determine not only whether the petition is properly signed by the requisite number of freeholders, but every other fact necessary to the granting of the prayer of the petition. By making the order granting the petition, the Board must be taken to have decided that the necessary facts existed to warrant such action, and such decision, however erroneous, cannot be collaterally attacked. (*Board* v. *Hall*, 70 Ind., 474-5.)

The presentation of the petition to the common council called into exercise its jurisdiction, and required such council to determine as to the sufficiency of such petition or written agreement, both in form and substance, whether or not it was signed by the owner or owners of the lands which were sought to be annexed, and every other jurisdictional fact.

Although the common council of East Chicago assumed jurisdiction and entered an order of annexation in strict conformity with the statute, yet there is no presumption that they investigated or determined the fact of ownership of the land, upon which fact their authority to make the order depended, or even if they be presumed to have done so, yet the correctness of their decision may be collaterally questioned. (*Ibid.*)

Although on the presentation of the petition of the Improvement Company to said common council, one of the questions to be met and decided was whether said petitioner was the owner of the land described in the petition (and unless such were the fact said council was not authorized to grant the prayer of the petition), and although such agreement and petition called into exercise the jurisdiction of said council, and authorized it to determine not only such questions of ownership, but every other fact necessary to the granting of the petition, yet by making the order, granting the petition the council cannot be taken to have decided that the petitioner was the owner of said lands, or if so taken such decision may be controverted and the same question litigated over again in a collateral proceeding by a party having no interest in the subject-matter thereof. (*Ibid.*)

Although the presentation of the petition to the common council may have called into exercise its jurisdiction, and required such council to determine as to the sufficiency of such petion both in form and substance, and whether or not it was signed by the owner or owners of the land which were sought to be annexed, as well as every other fact precedent and concurrent, necessary to the granting of the

prayer of such petition, yet the determination of such council upon facts is not valid, binding or conclusive, and can be impeached collaterally by a party owning no interest in said lands, if in fact said petition was not signed by all the owners of said land. (*Ibid.*)

The petition laid before the common council presented a subject-matter within the general scope of their authority, to annex territory with the consent of the owner or owners thereof. They therefore had the right to hear and determine all questions arising upon such petition, and this right is jurisdiction. The right to hear and determine those questions, necessarily implies the power to decide any or all of them, wrong as well as right, and whether their decision be wrong or right, it cannot be regarded as void, but as binding until appealed from or vacated, in some legitimate mode. (*Snelson* v. *State*, 16 Ind., 29 (32); *Board* v. *Markle*, 46 Ind., 96 (110, 111).

It may be admitted that the petition laid before the common council presented for their consideration and action, a subject-matter within the general scope of their authority, to annex territory with the consent of the owner or owners thereof, and that they had a right to hear and determine all questions arising upon such petition, including that of the ownership of the land therein described, but that did not give them the right to decide such questions contrary to law or fact, and it may be shown in a collateral proceeding that their decision in respect to any of those questions was wrong, and, if it be so shown, their decree of annexation may be treated as a nullity. (*Ibid.*)

Although the common council of the city of East Chicago have jurisdiction of the general subject of annexing territory by and with the written consent of the owner or owners thereof, and although in this particular case said council, upon the presentation of the petition or written consent required by law, assumed and exercised jurisdiction, and ordered certain territory to be annexed, said petition or written consent appearing upon its face to be sufficient in all respects to authorize such action, yet there is no presumption in favor of their authority so to act, and in a collateral proceeding such authority may be questioned by a party having no right, title or interest, legal or eqitable, in or to any part of said territory, and it may be

shown by evidence not only *dehors* the record, but in direct contradiction thereof, that an entire stranger, namely, The Chicago and Calumet Terminal Railway Company, was the owner of or had some interest in a strip of land one hundred feet wide, and extending across said territory. (*Ibid.*)

The right to hear and determine the question of title to the land described in the petition was jurisdiction, and such determination cannot be collaterally attacked, although erroneous.

Board v. *Markle*, 46 Ind., 96. Cited and approved in *Cason* v. *Harrison*, 135 Ind., 335.

The right to hear and determine the question of title presented by the petition was not jurisdiction, and if the decision of the common council upon that question was erroneous their order annexing the territory was a nullity, and may be so treated by all persons whatever. (*Ibid.*)

It is not necessary that the record of an inferior tribunal should show any express finding of jurisdictional facts; such finding will be presumed in support of the proceedings if their records show the granting of the petition. (*Stoddard* v. *Johnson*, 75 Ind., 20.)

Although the filing and presentation of the petition authorized the common council to determine the question of title, yet inasmuch as their record does not show an express finding upon that question, it will be presumed that they did not determine it, and it is still open to investigation collaterally. Such express finding will *not* be presumed in support of their proceedings, although their record shows the granting of the petition. (*Ibid.*)

In a collateral attack upon proceedings to appropriate lands for right-of-way which are statutory and special, and not in accord with the common law, every reasonable presumption is to be indulged in favor of the regularity of such proceedings. (*Indiana Ec. Co.* v. *Ry. Co.*, 107 Ind., 301.)

In a collateral attack upon proceedings to annex lands to cities with the consent of the owners thereof (which are also statutory and special, etc.) no presumption is to be indulged in favor of the regularity of such proceedings. (*Ibid.*)

Where a county board, in acting upon a petition, passes upon a question of fact the decision of the board cannot be collaterally attacked, but the remedy is by appeal; and where, upon petition, such board orders an election, such order is a finding by the board that the necessary facts are shown to give the board jurisdiction. (*Bell* v. *Maish*, 137 Ind., 226. Decided at Nov. term, 1893. Opinion by Howard, C. J.)

Where a common council, in acting upon a petition, passes upon a question of fact the decision of such council *is* subject to collateral attack, and no appeal is necessary; and where, upon petition, such council orders the granting of the petition, such order is not a finding that the necessary facts are shown to exist to give the council jurisdiction. (*Forsyth et al.* v. *Hammond.* Opinion by Howard, J. Filed April 11, 1895.)

Which of these last two cases is the law? Or is one rule to prevail in regard to the proceedings of county boards, and another and different rule to be adopted in regard to the proceedings of common councils?

It would seem unnecessary to accumulate authorities upon this question, but we invite the special attention of the court to *Quindre* v. *Williams*, 31 Ind., 444, cited, but not quoted from in our principal brief. That was a case of a guardian's sale of real estate by order of the Probate court of Knox county. The land was situate in Allen county, and the minors were residents of Illinois, and these facts were shown in the record by evidence. It was nevertheless held by this court that it was the function of the Probate court to ascertain its jurisdiction before proceeding to make the order to sell the real estate, and it having acted, its action could not be collaterally attacked.

Is this, and the many other cases which we have cited, sound law? If so, how can the opinion under consideration be brought in harmony with them?

It is perfectly clear to us that no legal acumen or criticism is sharp enough or strong enough to sever this case from the operation of the principle established by the cases which we have cited. Either this court must so modify its opinion as to make it conform to that principle or undertake the Herculean and hopeless task of overruling and overthrowing these cases. We can see no other alternative."

4th. Said decision is in conflict with the common law, with the decisions of the same court, and with the weight and current of authority as to the legal effect of a right of way granted to a railroad company.

Cin. & Ch. Ry. Co. v. *Geisel*, 119 Ind., 77.
Stuyvesant v. *Woodruff*, 1 Zab. (N. J.), 133.
Bodfish v. *Bodfish*, 105 Mass., 317.
Williams v. *Ry. Co.*, 50 Wis., 71.
Angell on Highways, 1-2.

These authorities show conclusively that a right of way is an incorporeal hereditament, and that the grant of a right of way is a grant of an easement only, and implies that the fee remains in the grantor.

A party having a right of way only has nothing more than the right of passage, and is not the owner of the *corpus* of land. The fee remains in the grantor of the easement.

That one of the deeds in this case contains a general warranty makes no difference. The quality and quantity of the estate conveyed is precisely the same whether conveyed by a warranty or quit claim deed.

If the right of way of a railway company will destroy contiguity, it will also create contiguity. Hence, a city, by annexing the right of way of any railroad that happens to run through its boundaries might bring itself in contiguity with all the most valuable land within the boundary of the county and annex it, and subject them and their owners to its power of taxation. In view of such conse-

quences, we think it would become a court to hesitate long, before holding, as the Supreme court of Indiana did, that a right of way of a railroad company cuts off the contiguity of the lands on either side of it or rather of the lands to which it has been annexed as an easement.

5th. Said decision is founded (1) upon an assumption of premises having no existence whatever in fact and which could not have had any legal existence at all; (2) upon a palpable misconception of the Grusenmeyer case, as shown by the learned judge who delivered the opinion of the United States Circuit Court of Appeals, and who also delivered the opinion in the Grusenmeyer case. Further, (3) said opinion of the Supreme court of Indiana in said case of Forsyth vs. Hammond is not well considered, is against the settled law of the state and so inconsistent and illogical in its reasoning as to lead to the grossest absurdities.

The opinion of Judge Howard overruling the petition for rehearing concedes "that annexation of territory to a city is a legislative function." But he attempts to escape from the consequences of this fatal admission by the assertion which we have seen to be utterly unfounded in fact, that the common council exercised such legislative functipn when it resolved to annex certain described lands to the city, and to present a petition therefor to the county board. That is to say, when a common council resolves to do that which it has no power to do, and the power to do which is exclusively vested in another tribunal, viz., the county board, then it exercises a legislative function. That there is no such power in the com-

mon council and that the same is vested in the county board exclusively, see,

City of Delphi v. *Startzman*, 104 Ind., 343–346, and cases there cited.

As a matter of fact, however, the common council of the City of Hammond did not resolve to annex the territory in question, as shown by exhibits A and B, hereto annexed; but recognizing the utter futility of such resolution simply drew up and signed a petition to the county board to annex such territory to the city—the only thing they had any power or authority to do in the premises, and so the proposition of the learned judge resolves itself into this, and nothing but this: The resolution of an inferior tribunal to avail itself of the right given it by law to petition another tribunal in which is vested the sole and exclusive right and power in its discretion to do or not to do, the thing petitioned for, is exercise of legislative power!!!

"It must be admitted, however, as we think," adds the learned judge, "that the after proceedings had upon the petition are of a judicial nature." The logical and inevitable deduction from which is that a petitioner, for a certain legislative enactment, viz.: the annexation of territory to a city, is a legislator, but the body to which the petition is presented, having sole and exclusive power in its discretion to grant or refuse the enactment is a judge and not a legislator!

By the learned judge's admission: "annexation of territory to a city is a legislative function." Yet, the body which executes that function in doing so acts in a judicial capacity, but the body which has no authority in the premises except to petition, by exercising the right of petition, performs a legislative function!!

In the last analysis, the learned judge's proposition is reduced to this. The expressing a desire for a legal enactment without power to make it is legislation. The actual making of the enactment or the refusing to make it by the body vested with sole power to do so is adjudication ! ! ! And this, it is said, settles and forecloses the proposition that by the law of Indiana, the county commissioners in annexing, or refusing to annex territory to a city act in a judicial capacity, and that the common council in petitioning the county commissioners to annex certain territory, act in a legislative capacity, perform a legislative function, and the Circuit court of Appeals, it is said, committed error by refusing to be governed and controlled by a decision bottomed on such reasoning, notwithstanding it was shown and demonstrated in our brief upon the petition for rehearing in the Supreme court of Indiana as clearly and conclusively as any proposition, either of law or fact, could or can be demonstrated by human reasoning, that the Grusenmeyer case having arisen under an entirely different statute and different state of facts involves no question having the slightest connection, affinity, or analogy to the question involved in the petition for rehearing. Yet the court, without attempting to parry or refute that argument and without even an allusion to it, persisted in calling the Grusenmeyer case a similar case and in applying the language of his Honor, Judge Woods, in that case to this case as if in fact they were similar cases.

What the Grusenmeyer case really decided and that it had no application to the case in hand, but was an entirely dissimilar case, founded on entirely different facts and statutes, is ably and clearly shown in Judge Woods' opinion set forth in Exhibit C of petition herein, which see pp. 76–80.

It is perfectly manifest that the opinion of Judge Howard, in overruling the petition for rehearing in *Forsyth* v. *Hammond*, is bottomed entirely on two palpably erroneous notions, viz.:

(1.) That the exercise of the common council of the right of petition to the county board for annexation of territory was a legislative act; (2.) that the Grusemeyer case had decided that the action of the county board in granting or refusing a petition by a city for annexation of territory is judicial action; whereas that case decided nothing of the kind and is not at all in point, but, on the contrary, the *dictum* of the case is directly against that assumption.

Without noticing or alluding to our argument that the law does not prescribe all the conditions of annexation and that it could not do so, and that even an attempt to do so might be attended by mischievous and unjust consequences as to the public welfare, and without even an allusion to that lucid, able, and lawyer-like exposition of the statute in question given by that eminent and venerable jurist, the late Lyman Trumbull, which we caused to be laid before the members of the Indiana Supreme court, the learned judge proceeds to say:

"It is the law itself, as has been said, that fixes the conditions of annexation, and the office of the board and of the court is to determine whether the conditions so prescribed by the law have been complied with. The legislature has expressly provided for such judicial determination by the board and for an appeal therefrom to the court, and this court has frequently recognized the right to such appeal."

He cites several cases, but not one of them involves the question involved before the court, nor any question analogous thereto.

Not one of them is in point as to the question which was then before the court. The opinion of Judge Baker is quoted with entire approval, notwithstanding it had been conclusively shown in the appellant's brief for rehearing that such opinion was based upon a number of unwarranted assumptions and palpable fallacies, and that the theory he propounded had no application whatever to the actual facts of the case. Can this decision then, in direct conflict not only with so many previous decisions of the same court upon the subject of appeals from discretionary decisions of the county board upon the questions of collateral attack and of the legal effect of grants of right of way, but with the very words of the statute itself, and even with the Grusenmeyer case also when properly interpreted—can this decision, made during the pendency of this case, and after the oral argument had been made and the Circuit Court of Appeals had arrived at their conclusion, be regarded as the well settled law of Indiana, which the Federal courts must accept and be governed by, irrespective of their own opinions and conscientious convictions in the matter?

For the Circuit Court of Appeals to have adopted such a decision would not only have been making itself subordinate to the State court, but a complete surrender of its own independence and a self-abnegation of its reason and judgment.

VIII.

Before leaving this branch of the case, we beg leave to submit some considerations in regard to the opinion of Judge BAKER, which we also submitted to the Supreme Court of Indiana; and to the Circuit Court of Appeals.

That opinion, while conceding the soundness of the principle established by the authorities which we have cited, that the power to incorporate municipal bodies, and to enlarge or contract their boundaries, is a purely legislative one, attempts to exempt this case from the operation of that principle. We think a little examination will show that the attempt has not been successful. The main proposition upon which the learned judge's opinion is based, and which seems to have had a prevailing influence upon his mind, is that "the constitution requires the organization of cities and towns, and the enlargement or contraction of the boundaries to be provided for and regulated by general laws." A conclusive answer to this is, that there is no such provision in the constitution, either in substance and effect or in spirit.

The subject is certainly not within any of the cases enumerated in Sec. 22, Art. 4, and if it be urged that it is within Sec. 23, a sufficient answer to that is, that it has been again and again decided that the legislature is the exclusive judge whether a statute on any subject not enumerated in Sec. 22 can be made general and applicable to the whole state. See

City v. *State*, 118 Ind., 426.
Wiley v. *Bluffton*, 111 Ind., 152.

Johnson v. *Board*, 107 Ind., 24. Citing numerous cases. Also
Sloan v. *State*, 8 Blackf., 361 (364).
Kelly v. *State*, 92 Ind., 236.
Warren v. *Evansville*, 106 Ind., 104.

No one, we apprehend, would ever contend that the subject is within Sec. 13, Art. 11, which provides: "Corporations other than banking shall not be created by special act, but may be formed under general laws," for if it be conceded that this section applies to municipal corporations it does not apply to this case, for this is not the case of the creation of a corporation, but of the extension of its boundaries, and hence not within the inhibition at all.

"But suppose it be granted, for argument's sake, that the legislature can provide for the organization of municipal bodies, and for the enlargement and contraction of their boundaries only by general laws. Of what significance is that? Does it logically or necessarily follow that the nature of the power is changed from legislative to judicial, or from being wholly legislative to partly legislative and partly judicial? The nature of a governmental power cannot be changed either by constitutions or by statutes. But the opinion assumes that the legislative power over municipalities has in some way been broken up and divided between the legislature and the judiciary, and it ignores the many decisions of the Supreme court of Indiana and other courts to thee ffect that under our system of government the departments are distinct and independent; that a legislative or any other governmental power cannot be broken up into fragments and one part assigned to one department and another part to a different

department, and that there is no such thing as a power partly judicial and partly legislative; that where the principal subject belongs there the incidents belong; that the means, methods and the like belong to the department that is vested with power over the general subject, and that where a subject is legislative it is excluded absolutely and entirely from the domain of the judiciary."

State v. *Kolsen*, 130 Ind., 441.
State v. *Noble*, 118 Ind., 350.
State v. *Denny*, 118 Ind., 386.
Ibid., 118 Ind., 449.
Hovey v. *State*, 127 Ind., 588.
Greenough v. *Greenough*, 11 Pa. St., 489.

"The decision in *Galesburg* v. *Hawkinson*, *supra*, was rendered long after the adoption of the constitution of 1870, which expressly forbade special legislation incorporating cities, towns or villages or amending the charters thereof and yet the court say: 'It must be admitted that the legislature might after this decree was rendered, have reversed the decision of the court by fixing by statute the boundaries of the city differently from those declared by the decree.' If this could not have been done by a special law, of course it could easily have been done by a general one."

The legislature can only make legislative or congressional apportionments by general law. Suppose the legislature should provide in such an enactment that the question whether the apportionment made were fair and impartial or just and equitable, might be submitted to the Supreme court, and if that court should find the apportionment not to be fair and impartial, or not just and equitable, then such court might proceed to make the ap-

portionment itself. Would anybody contend for a moment that such a law would be constitutional? So it is competent for the legislature to authorize a city to divide its territory into wards. Would anybody pretend that power could be conferred on the courts to revise the action of the common council, and if they thought the wards were not properly established, to make new ward divisions? So with reference to the making of election districts by the county board, and the like.

Suppose again that the legislature should attempt to authorize the Circuit courts in the first instance to receive the petition of a certain number and class of citizens of any incorporated city to lay out and improve certain streets, or to prohibit domestic animals from running at large within the corporate limits, and hear evidence on the subject, and if they should find that the streets ought to be laid out and improved, or domestic animals should be prohibited from running at large, and no injustice would be done thereby, to render a decree to that effect. It is too patent for argument that such determination would be legislative and not judicial, and yet it is clear there can be no difference in principle between such cases and the case at bar. Such illustrations—and many more could be readily added—show the absurdity of attempting to make a function partly legislative and partly judicial.

The next proposition of his Honor, so stated as to limit it to the case in hand, is the power to hear and determine whether the conditions prescribed by law (for the annexation of contiguous territory) exist, is judicial in its nature, and may be appropriately conferred upon the courts." This, we submit, is a complete begging of the whole question. In the first place the proposition

assumes that the law has prescribed certain specific conditions of fact to be ascertained by judicial inquiry, and that upon their ascertainment in that mode the law *ex proprio vigore* effects the annexation, whereas, the law has prescribed nothing of the kind, but on the contrary, has prescribed a mode whereby such territory may be annexed by and through the judgment and discretion of the county commissioners without the finding of any fact or facts whatever, except those facts, merely, which pertain to this jurisdiction, and the annexation is not made by the law *ex proprio vigore*, but by the order or decree of the commissioner's court.

County commissioners are recognized by the constitution as local administrative bodies, and they are therefore properly made the depositaries of this power. They are constituted, as it were, a committee of the legislature, with power to make the annexation if in their opinion it ought to be made. They are authorized to hear evidence for the purpose of enlightening their judgment, but they are left masters of their own discretion. Without or against that discretion no annexation can be lawfully made, except by the legislature itself. As annexation is an act of the sovereign power of government, the legislature may of course make, or cause it to be made at any time, but the judiciary can have nothing to do with it.

In *Sloan* v. *The State*, *supra*, the court says: "The special powers conferred upon them" (municipal corporations) "being wholly political, exist only during the will of the legislature. Such powers may at any time be repealed or abrogated by the legislature either by a general law operating upon the whole state, or by a special act altering the powers of the corporation." This decision,

though made under the old constitution, is none the less authoritative under the new, and it shows that the municipal power of annexation is wholly political, and completely under the control of the legislature.

But the proposition under consideration is still more seriously faulty and fallacious, in that it assumes that all conditions and facts proper to be considered in such cases are capable of judicial ascertainment, and completely ignores the paramount question which predominates and inheres in all such cases, and that is, Does the common weal require the enlargement of the municipality? It is manifest that the proper consideration and determination of this question involves questions of policy and expediency concerning the propriety of making a change in the machinery of government, and of compelling unwilling persons to be brought under municipal control, and making their property tributary to local interests in which they have no concern. Such questions require for their proper consideration and determination a scope of inquiry too wide to be admissible under the rules of evidence, and an information too various to be attainable by judicial inquiry. Such questions in their very nature are obviously political or legislative and not judicial. The legislature has, therefore, wisely delegated the power to decide them to the county commissioners, a body presumably impartial and possessed of the requisite local information, and of local administrative, and in a qualified sense, legislative powers. That body having, in this case, exercised that power, it is exhausted, it is *functus officio*.

"The creation, enlargement, or contraction of a municipal body," proceeds the opinion, "is not the act of the court, but is the act and result of the law. The court

simply determines whether the conditions are present which authorize the creation of a municipal body or the enlargement or contraction of its limits, and when these conditions are judicially ascertained, the law *ex proprio vigore* creates the municipal body or enlarges or contracts its boundaries."

This theory may appear at first sight rather plausible, but it will not stand the test of examination for a moment. The fallacy of it consists in assuming that courts of justice may determine "whether the conditions are present which authorize 'the creation of a municipal body or the enlargement or contraction of its limits.'" This is the very thing that courts of justice may not do—the very thing which they are forbidden to do. To determine whether the conditions are present which authorize the things specified, or any one of them, is as clearly and certainly a legislative function as anything that the legislature can do. If courts can exercise this function it is difficult to imagine any legislative function which they may not perform, and the legislature might as well be dispensed with as an unnecessary, useless and costly appendage to our governmental system.

There is not the slightest analogy between this case and those cases where laws have been enacted to become operative upon the happening of some future contingency. In that class of cases the precise facts or contingencies have been specified, upon the happening of which the enactment was to become operative, and a mode prescribed for the ascertainment of their existence, but in the class of cases to which the present case belongs no facts or contingencies except those merely jurisdictional have been specified upon the happening of which a municipality might enlarge its boundaries; but,

on the contrary, from the impossibility of prescribing in advance all the conditions proper to be considered in such cases, the legislature has wisely left the entire subject to the discretion and judgment of the county commissioners.

A further objection to Judge Baker's theory is that it has no application whatever to the case in hand. What fact or facts were found in this case, either by the court or jury, upon which the law *ex proprio vigore* could act? Not a single one. The jury exercised the function of legislators and by their verdict expressed their opinion that the territory ought to be annexed. Upon the return of the verdict the court in its turn, without declaring any fact or facts exercised the legislative function pure and simple and declared that the territory be annexed; and if the annexation is valid it cannot be by virtue of any fact or facts found either by the court or jury upon which the law can operate and execute itself according to Judge Baker's theory. Doubtless it will be said that the verdict is equivalent to a general finding that all the facts stated in the petition are true. For argument's sake granted. But has the legislature prescribed that upon the existence of that state of facts or any given state of facts annexation should take place? Not at all. But on the contrary it has confided the whole matter to the judgment and discretion of the commissioners with full power to consider all questions of public and private convenience, of political expediency and propriety, of the reasonableness of the area sought to be brought under municipal control, of the propriety and reasonableness of its boundaries, and all other questions proper for the legislature to consider when legislating in such cases, but incapable of precise definition and absolutely impossible to be prescribed beforehand as conditions of annexation.

In the exercise of these powers the commissioners had a perfect right, and may have had good reason and cause to refuse the prayer of the petition notwithstanding every fact stated in it was true, and by them known to be true. Other reasons which they had a perfect right to take into consideration may have had a more prevailing influence upon their minds than the facts stated in the petition. It is perfectly evident why the legislature has always refrained from attempting to specify the conditions and facts under which annexation may be made. It is perfectly evident that the thing is in its nature impossible to be done, or at least to be done well, and that an attempt to do it might be attended with incalculable mischiefs, both public and private. Those commissioners being thus fully empowered by law, not only to hear and consider and be controlled by any fact, circumstance or reason, which legislators might properly consider and be controlled by in such a matter; these commissioners in the exercise of their judgment and discretion refused the prayer of the petition, and it is now said that their judgment and discretion may be lawfully dispensed with and the annexation made in opposition thereto upon the verdict of a jury of a neighboring county rendered under the restrictions of the rules of law and evidence. It is scarcely conceivable that the legislature could have contemplated or intended such a result. The jury were allowed to visit the premises; and in their verdict they express their opinion that the territory ought to be annexed. How is it possible they could arrive at such conclusion without considering questions of policy and expediency and other questions hereinbefore alluded to, with which courts and juries have nothing to do?

The inquiry in the trial court was not to ascertain and

determine whether certain prescribed conditions upon which the law is to take effect exist or not, but whether as to a certain territory there ought to be a change in the existing law on a variety of subjects, and particularly on that of taxation, and whether the inhabitants of said territory ought to be subjected to additional burdens of taxation. The inquiry necessarily involved the question what shall be the law as respects the boundaries of the City of Hammond and as respects the territory sought to be annexed? Shall those boundaries remain as they now exist by law, or shall they be changed in accordance with the prayer of the petition so as to subject the new territory to a new code of laws and to additional taxation? A change in the boundaries necessarily involves a change in the law as it now exists both in respect to the City of Hammond and in respect to the new territory. The decree of the Porter Circuit court neither assumes to be, nor is the establishment of any facts or state of facts or conditions, nor a declaration of rights under the law, but if valid it is the law itself amending and changing the previous law as to the extent of territory over which the municipai government of the city of Hammond shall obtain and be established. *This is not the applying of the law, but the changing or amending of the law; for if this decree be valid, there is no disguise by which the fact can be conccaled that the law over a large extent of territory has bern changed by it.* And so in the last analysis the inquiry is reduced to this simple question: Can the judiciary change the law of the land?

The opinion proceeds: "While this precise question has been but seldom referred to, the Supreme court (of Indiana) has in cases too numerous to justify citation by

taking appellate jurisdiction recognized the power of the courts to hear and determine the questions confided to them by the statute providing for the incorporation of cities and towns. In the case of *Grusenmeyer* v. *City of Logansport*, 76 Ind., 549, the court expressly affirmed the jurisdiction of the courts to hear and determine these questions, and the court then decided that these questions are judicial in their nature. This case has been cited and approved in many more recent decisions of the court. The case must be regarded as settled in this jurisdiction adversely to the contention of the complainant's counsel."

This, we submit, is a too general and summary way of disposing of the case to be either satisfactory or convincing. His Honor seems to have lost sight of the precise question involved, and to have confused it with other questions which have no relevancy whatever to it. The precise question involved is: *Will an appeal lie to the Circuit court from the decision of a county board denying the petition of a city for the annexation of territory, and is a statute purporting to authorize such appeal constitutional and valid?*

As we have shown, no such question nor any question analogous thereto was involved or decided in the Grusenmeyer case. True, the Grusenmeyer case has often been cited and approved, but only upon the points therein settled and decided, and this question was not one of them. And we confidently assert and challenge denial that this precise question, or any questions analogous thereto, has never been raised or decided in the Supreme Court of Indiana. And so the conclusion of his Honor that "the question must be regarded as settled in this "jurisdiction adversely to the contention of complain-"ant's counsel," is wholly unsupported by the facts.

IX.

Independently of the principal question which we have been discussing there still remains another reason why Judge Baker's decision was rightly reversed by the Circuit Court of Appeals.

No formal demurrer was filed to the bill, but the case was submitted to the court upon the amended bill of complaint, and briefs and argument of counsel. The case therefore stands as if upon formal demurrer and all the traversable allegations in the bill are admitted to be true. The necessary consequence is that the city of Hammond admits that prior to the presentation of its petition to the county board the city of East Chicago had, with the consent of the owner, annexed to its boundaries a strip of land about a quarter of a mile wide, which intervened between the boundaries of the city of Hammond and the remainder of the territory over which by its said petition it sought to acquire jurisdiction and entirely cut off the contiguity of the same. It further admits that prior to said time considerable portions of said territory sought to be annexed had been laid off into lots and platted. It must, therefore, necessarily admit the legal consequence of these facts which is that the county board had no jurisdiction over the subject-matter of the petition, and that the prayer thereof was necessarily and rightfully denied. The city of Hammond further admits that at and before the presentation of said petition it with a population of only 6,000 or 7,000 had territory to the extent of about six square miles, two entire congressional sections of which on the north by which alone it could have contact or contiguity with the terri-

tory it sought to annex were almost totally uninhabited and unoccupied, the one not having a house or a road upon it and the other having only one road and seven houses. That the territory it sought to annex contained about five square miles of land, no part of which was needed by said city for roads, streets or alleys or for the carrying out of any city improvements or for any legitimate city purpose whatever. That the attempted annexation was unreasonable, unnecessary and uncalled for by the wants of said city or by the wants or wishes of the inhabitants and property owners of said territory, whose property would be greatly diminished in value thereby, and that the peace, good order, tranquillity or prosperity either of the city or of said territory did not require that said territory should be brought under the municipal control of said city. The city of Hammond further admits that its said attempted enlargement was an abuse and violation of its franchises, a contemplated fraud upon the law of the State of Indiana and was prompted by covetousness and greed and a corrupt desire on the part of its authorities to subject the land and property in said territory to the burdens of taxation for the sole benefit of said city, and to raise means to pay off its heavy indebtedness and thereby relieve the inhabitants of the original and proper city of a portion of such indebtedness without rendering any service, advantage or benefit whatever in return. The city of Hammond further admits that it had no other purpose in attempting the annexation of said territory than to tax the lands and other property therein for its own benefit. That the tax which it has imposed is based upon an unreasonable and unfair valuation, and is exorbitant, extortionate and oppressive. The city of Hammond further admits that

the inhabitants of said territory have no need whatever for being brought under its municipal control, and that it has in the nature of things no ability or power to render them any return or compensation whatever, either substantially or theoretically, for the taxes thus imposed, and that their lands have been greatly impaired and diminished in value and their sale rendered difficult if not impossible by such extortionate and oppressive taxation. The necessary inference from all these admissions is that the city of Hammond has been engaged in a scheme to plunder under the forms of law the inhabitants of a large district of country out of many thousands of dollars annually. Had a private citizen engaged in a scheme for that kind of peculation and plunder, he would be pronounced infamous. Had a private citizen made confession of that kind of crookedness every right minded man would denounce him as a shameless knave and despicable scoundrel.

If such facts so confessed by the city of Hammond do not make out a case for equitable relief, pray, what facts would? Surely it was error to dismiss the bill for want of equity, for the bill must stand or fall by the matter appearing on the face of it without regard to any extrinsic fact or circumstance.

X.

The fifth assignment of errors is as follows:

"The court erred in holding that it is competent for the legislature of Indiana to vest legislative power in the Board of County Commissioners."

This proposition of counsel is completely answered by *Stiltz* v. *Indianapolis*, 55 Ind., 515, a case involving the construction of the very statute in question here. It was there held that the statute is a delegation of legislative power to the commissioners.

Judge BIDDLE, in delivering the opinion of the court, on page 59 says: "We hold, however, that the statute should be closely construed because it is a delegation of legislative power, but not impracticably strict."

On page 524, the same judge says:

"Boards of commissioners have been long since au-
"thorized by the legislature to form new counties,
"change the boundaries, and reconstruct township lines,
"and their constitutional power to do so has never, we
"believe, been seriously questioned.

"We do not see any distinction in principle between
"such a power and the power delegated by the legisla-
"ture to a board of commissioners on petition of the
"common council of a city to annex territory to the
"municipality."

The case of *Peru* v. *Bearss*, 55 Ind., 576, cited by counsel is not at all in point. It merely decides that an order of the county board annexing to the city part only of the land described in the city's petition is inoperative and void.

The board of county commissioners in Indiana is not a judicial body, nor a part of the judiciary of that state. Boards doing county business are expressly recognized by the constitution, and power is granted to the legislature to confer on them powers of a local administrative nature. Questions of a judicial nature, that is to say, *quasi* judicial questions often come before them for their decision, but this by no means makes them a part of the judiciary of the state, and under Article 6, Section 9, of the Constitution, the general assembly has ample power to confer upon such board the legislative or administrative power in question.

XI.

The sixth assignment of error is as follows:

"VI. In the division of the powers of government demanded by the constitution of the City of Indiana, it is neither required nor contemplated that the line of demarcation shall be a distinct one, nor the separation absolute."

"The court erred in holding that the annexation of contiguous territory to cities against the will of the owner is purely legislative. Such power is judicial, and under the constitution, exercisable by the board of county commissioners as a judicial body."

The proposition of counsel "That in the division of "the powers of government by the constitution of the "State of Indiana, does neither require nor contemplate "that the line of demarcation shall be a distinct one, "nor the separation absolute," is a novel one to say the least, and if tenable, it would make the division of the powers of government in the constitution of the State

of Indiana a mere theory of little or no practical use or value. The Supreme Court of Indiana have thought and held far otherwise.

See *Wright* v. *Defrees*, 8 Ind., 298.
Shoultz v. *McPheeters*, 79 Ind., 373.
State v. *Noble*, 118 Ind., 350.
State v. *Denny*, 118 Ind., 382.
Hovey v. *State*, 127 Ind., 588.
State v. *Colson*, 130 Ind., 442.
State v. *Haworth*, 122 Ind., 462.
Hancock v. *Yaden*, 121 Ind., 366.
Greenough v. *Greenough*, 11 Pa. St., 487.
Legal Tender Cases, 12 Wall., 457.

The cases cited by counsel either do not sustain their proposition that the power of annexation of contiguous territory not platted to cities against the will of the owner is judicial and under the constitution exercisable by the board of county commissioners as a judicial body, or they are not well considered and are against the current and weight of authority.

They cite among others *Windfall Co.* v. *Emery*, 41 N. E., 814, decided by the Supreme Court of Indiana Nov. 5, 1895. This is obviously not in point, for in that case the appeal was taken by the land owner and not by the city.

One of the causes assigned for a new trial was the insufficiency of the reasons assigned for the annexation of the territory. It was held that the sufficiency of such reasons is within the discretion of the commissioners, and the exercise of such discretion will not be controlled by the Supreme court.

They cite:

Catterlin v. *Frankfort*, 87 Ind., 45.
Chandler v. *Kokomo*, 127 Ind., 295.
Ellston v. *Board*, 20 Ind., 272.

No question was raised as to the jurisdiction, but as the court holds that the discretionary power of the commissioners is not subject to review, the case is directly in our favor and against the other side. The decision of the commissioners was in favor of and not against the city. Hence the case is very clearly distinguishable from the case now under consideration.

In the *City of Burlington* v. *Leebrick*, 43 Iowa, 252, the court says: "Section 431 provides that the territory to be annexed must be abutting and contiguous to the city, and it must have been laid out into lots, or parcels containing two acres or less. The petition must prescribe the territory and allege these facts."

"Certainly these are issuable facts and a determination of these issues is a judicial act. The legislature has passed a general statute that the territory to which *certain* conditions belong may be annexed. The right to annex it depends upon the existence of the conditions."

This reasoning is very unsatisfactory and inconclusive. In fact, it is manifestly sophistical. The court entirely evades the fact that if the Circuit court find the allegation of the petition to be true, that is to say, that the territory sought to be annexed is abutting and contiguous and has been laid out into lots containing two acres or less, *and that justice and equity require that said territory be annexed to such corporation*, a decree shall be entered accordingly, and from the time of entering such decree the territory therein described shall be included in and become part of such corporation; and the court entirely fails to meet the argument, that under cover of the finding that justice and equity require the territory to be annexed, the Circuit court is, in reality, required by

the statute to exercise an act of sovereign legislation, and instead of determining what the existing law is in relation to something already done or happened, it is required by the statute to determine what the law shall be for the territory thus annexed. Is the finding that justice and equity require the territory to be annexed to the city a finding of fact?

In *Kayser* v. *Trustees of Breman*, 16 Mo., 88, the court say:

"We do not conceive that the act of 1845 is a delegation of political power. The duties imposed on the County court in relation to this subject are judicial in their nature. They have no discretion. They have no authority to vest any power in the corporation. Their office is upon the performance of certain acts by the inhabitants to declare them incorporated, if satisfied as to the verity of the facts set forth, and then the law declares the powers of which the corporation shall be possessed. The statute under which this decision was made is as follows:

"Whenever three-fourths of the inhabitants of any town or village within this state shall present a petition to the County court setting forth the metes and bounds of their village and commons and praying that they may be incorporated and police established for their local government and for the preservation of any commons pertaining to said town or village, and the courts shall be satified that two-thirds of the taxable inhabitants of such town or village have signed such petition, and that the prayer of the petition is reasonable, the court may declare such town or village incorporated,' etc.

It will be observed that this statute is widely different from the statute of Indiana now under consideration. It is further to be observed that the County court in Missouri is, by the constitution, given power to *transact all county business, and such other jurisdiction as may be conferred upon it by law.* But, this case was virtually overruled by the case of *Woods* v. *Henley*, 55 Mo., 560. That case was this:

The inhabitants of the Town of Cameron in the year 1867 applied to the County court to be incorporated according to the statute. The act of incorporation was passed by the court and entered of record, whereby the Town of Cameron was incorporated. It became necessary to amend the County court's record in order to show the exact location of the town. Of this, the court on page 563 says :

"The act of incorporation as passed by the County court was not a judicial act, or in the nature of a judicial act which could not be amended or corrected at the subsequent term so as to correspond with the original papers. It was in the nature of a legislative or administrative rather than a judicial act."

The case of Borough of Little Meadows, 35 Pa. St., 335, is very interesting, and as we should think, not at all consoling or beneficial to the petitioner herein. The State of Pennsylvania under which the decision was made did not contain, nor has any constitution of Pennsylvania ever contained a provision forbidding the different departments of the government from exercising the powers of one another, and in Pennsylvania, from time immemorial, boroughs and villages have been incorporated by the Court of Quarter Sessions with the aid of a jury. It was decided in the case above cited that the

court had no power to incorporate a village so as to include within the boundaries of the corporation a large body of the surrounding farm lands, and that no more than the village itself can be incorporated.

The remarks of Lowry, chief judge, are very vigorous and utterly hostile to a municipal annexation, like that in this case. He said:

"We meant as we spoke when we said on several former occasions that we would not undertake to decide as a matter of law how far the limits of an actual village might be regarded as extending in incorporating it into a borough, but certainly we did not suppose that what we then said would ever be considered as sanctioning such a stretch of an act of the Assembly as this.

Why here is ground enough to admit the plat of the city of Philadelphia, as it was before its late extension and several respectable villages besides. It is a town or village that may be thus incorporated, and here is a little cross-roads village that fancies that its true dimensions include several large farms lying around it and gets an order to incorporate them and it into a borough. The fundamental mistake consists in supposing that any more than the village proper, with its proper territory, can be incorporated. All this land is not a village. We can decide this as matter of law just as well as we can say as matter of law that a river is not a lake, or a township is not a county, for it is merely declaring the meaning of the words in a law, and it is quite unjust to give a village such an extension, for this puts all the farm lands around it in the power of the real villagers to tax them as they please, and expend the taxes for themselves, and experience does not justify us in presuming that such power would be justly exercised when it can

be exercised selfishly. This decision was rendered under the constitution of 1790 which did not define the powers of the several departments of the state government, nor as above stated, prohibit one of the departments from exercising the powers of another, and, singularly enough, the present constitution, that of 1874, contains no such definition or prohibition."

Of the case of *Callen* v. *Junction City*, 7 L. R. A., 736, we may say as we did of the case of *Burlington* v. *Leebrick*, *supra*, that it wholly evades the real question in the case. That is to say, that the judge to whom the petition is made is required by the statutes to exercise a purely legislative function.

The statute of Kansas referred to by the court provides that the judge "shall proceed to hear testimony as to the advisability of making such addition, and upon such hearing, if he shall be satisfied that the adding of such territory to the city will be to its interest and will cause no manifest injury to the person owning the real estate in the territory sought to be added, he shall so find." This provision of the statute, the court seems to have entirely overlooked, for if legislative discretion is not involved in determining "the advisability of making the addition and that it will be to the interest of the city, and not cause manifest injury to the persons owning the real estate in the territory sought to be annexed," then it is difficult to conceive a case in which such discretion is involved. This statute certainly does require the judge to exercise a legislative function in all respects, except the finding of some jurisdictional facts. The court based their whole opinion upon the proposition that the finding of the judge upon the jurisdictional facts is the exercise of a judicial power, and

they entirely evade that part of the statute which requires the judge to exercise a purely legislative discretion. Could any lawyer be found who would contend that the determining of the advisability of annexing certain territory to a city; that it would be to the interest of the city and cause no manifest injury to persons owning real estate in the territory sought to be annexed, is the finding of any fact or facts? Is it not palpably evident that these are mere mental conclusions and not findings of facts?

Moreover, it is evident that the court had not read the case of *Blanchard* v. *Bissell*, 11 Ohio St., 96, which they cite as an authority that the power under consideration, viz.: the power in a municipality to annex territory is judicial, for that decision was made under a statute widely dissimilar. And so far as the case is in point at all, it is directly against the contention of the Kansas court.

In the Ohio case the defendant in error had applied for and obtained an injunction from the proper court against the collection of certain taxes which had been levied on certain town lots and lands owned by him and forming part of a certain territory which the commissioners of Lucas county upon the petition of the common council of the City of Toledo ordered to be annexed to said city.

The plaintiff in error took the case to the Supreme court, which reversed the decision of the court below. The statute under which the commissioners made the annexation provided that "when any municipal corporation shall desire to annex any contiguous territory not embraced within the limits of any city or incorporated village, the trustees or counsel of the corporation proposing such annexation shall submit the question to the qual-

ified voters of the corporation by an ordinance, and if a majority of such voters voting on the question shall vote in favor of it, the corporation shall present to the county commissioners a petition praying for such annexation, which petition shall describe the territory, etc., and have an accurate map and plat attached thereto."

The language of the court bearing upon the powers of the commissioners is this:

"They may refuse to make the annexation if they deem it unreasonable or improper, though all the parties assent to the measure, and if they consider it reasonable and proper they may order it upon the petition of the corporation without the consent and against the will of any other party. The clear terms of the state law leave no room for a doubt that such was the intention of the legislature."

This is certainly directly against the contention of the Kansas court and of the other side in this case that the power vested in the commissioners to annex territory to cities is judicial, and it is good authority for us that such power is purely legislative.

The opinion in the *City of Wahoo* v. *Dickinson*, 23 Neb., 426, summarily disposes of *Shumway* v. *Bennett*, 29 Mich., 452, by saying that "it arose under a different statute from ours."

This will not do, for, although the case arose under a different statute, the principle involved is precisely the same.

Galesburg v. *Hawkinson*, is admitted to be under a similar statute, but the court says:

"We are unable to give our assent to the reasoning in that case;" and then the court goes on to say:

"It will be conceded that an arbitrary annexation to a city or town where the benefits to be received by the territory annexed are not considered can only be accomplished by legislation, either by the legislature itself or by a tribunal clothed with power for that purpose and that a court under our constitution could not be vested with such legislative power."

"We do not understand the statute, however, as clothing the court with power, * * * *to determine in the first instance what territory should be annexed. This power is bestowed upon the city council. The evident purpose is to protect the owners of property from being forcibly brought within the corporation unless one of two facts is made to appear:*

"1st. That the territory or a part of it will receive material benefit from its annexation to such corporation —that is, if all the territory sought to be annexed will receive material benefit, then a decree will be entered accordingly. If but part receive this material benefit, then a decree will be entered only for such parts.

"2d. Where justice and equity require such annexation of said territory or a part thereof, then a decree will be entered according to the facts as found. The determination of these questions is a judicial act and the courts are duly empowered and the question is proper for the courts to consider."

It will be seen at once that the statute of Nebraska under which this decision was rendered is entirely different from that of Indiana.

It empowers the city council to make the annexation subject to certain conditions which are to be determined by the court. If these conditions were mere conditions

of fact, as the court assumed them to be, then the decision of the court might be defensible. But this presumption of the court is unwarranted for the power to find "that such territory or any part thereof would receive material benefit by its annexation to such corporation, and that justice and equity require such annexation," is not the grant of power to find any fact or facts, but to express an opinion upon and determine questions of policy and expediency which are purely legislative, as the court admits. This case is clearly against the current of judicial decision and all well-known text writers. It is bottomed on the case of *Burlington* v. *Leebrick*, *supra*, the reason of which is faulty and defective, as we have shown. Such a case, we think, cannot be regarded as authoritative here.

The courts of Quarter Sessions in Pennsylvania, and the County courts in Missouri take the place of our boards of county commissioners in the municipal government of the county. These courts are created by the organic law of each of those states, and they are not exclusively judicial, but they are *quasi* municipal bodies invested with certain powers of local legislation, hence the cases in either of those states have no application here.

XII.

The seventh and last assignment of error is:

"The court by their decision erroneously denied by the judgment of the Supreme court of Indiana, with full power and credit acquired by Article 4, Section 1 of the constitution of the United States and the legislation of Congress enacted in pursuance thereof."

There is manifestly nothing at all in this proposition requiring an answer. The very authority which counsel quote, *Story on Constitution*, page 281, is a conclusive answer to the proposition. It is only where the jurisdiction of the court in another state is not impeachable either as to the subject-matter or to the persons that the record of the judgment is entitled to full faith and credit.

As we have hereinbefore shown, jurisdiction over the subject-matter or the person is jurisdiction to deal with the subject-matter, or the person within the scope of the power of the court, and that any judgment or decree in relation to the subject-matter or the person which transcends the scope of the power of the court is, and will be treated as a nullity everywhere.

As to the fancies in which counsel take the liberty to indulge under this head in regard to the need of draining the lands in question in order to preserve the health of the people of Hammond, and in regard to gambling in its most offensive form going on in close proximity to that city, we have only to say that as they are in regard to matters wholly outside of the record, we will not presume that counsel expect the court to notice them, nor will we notice them any further than to say they are mere off-

springs of a vivid imagination, having no more reality in fact than castles built in air, or the "baseless fabric of a vision."

If the remarks of counsel were meant as a satire on Hammond, or as a sort of railery or irony on the wild and extravagant aspirations of that enterprising little city in the way of absorbing territory enough to accommodate a million or more of people, they would be quite pertinent and effectual. In this case they are merely *vox et preterea nihil.*

"The consequences are disastrous," quoth the learned counsel. "If that territory within the description of the petition filed with the county board is annexed as to all owners of land embraced therein who reside in Hammond and cannot therefore appeal to the United States court, and also as to all resident owners whose taxes are so small that the amount involved does not give the Federal court jurisdiction, while the same proceeding is void as to the appellant, and others similarly situated." We fail to see anything disastrous in this situation.

The condition of the land owners who cannot appeal to the Federal courts for relief is certainly made no worse by the fact that others are more fortunately situated in that respect. The fact that the Federal court can relieve only a part of those who are suffering from illegal and oppressive taxation, is no reason why it should hesitate to relieve those whom it can, viz.: those who can bring their cases within its jurisdiction.

If the whole of a shipwrecked crew cannot be rescued from destruction, that is no reason why the best efforts should not be put forth to save as many as possible.

Whatever of disaster there may be in the situation of those whom the Federal court cannot reach and relieve is attributable not to that court but to an unwarranted assumption of power by a State court of Indiana and is an evil which all must suffer who reside in a state whose laws are either defective or faultily administered. But it is to be confidently hoped they will not have to endure that evil long. We cannot expect otherwise than that the Supreme court of Indiana will, as soon as an opportunity occurs, reverse their unfortunate decision in *Forsyth* v. *Hammond*.

We are unable to understand for what purpose the letters set forth in Exhibits D and E have been dragged into the petition herein, unless it be to show the abundance of misinformation as to the facts and the misunderstanding of the author of each respectively as to the legal questions involved in the case. Certainly these exhibits have no proper place in the record, and deserve no consideration whatever.

It is confidently submitted that neither petition nor brief of counsel show any maintainable or probable error in the record of the United States court of Appeals.

THOS. J. MERRIFIELD,
Solicitor for Respondent (Appellant below).

W. H. H. MILLER,
Of Counsel.

APPENDIX.

EXHIBIT A.

To the Board of Commissioners of the County of Lake and State of Indiana:

Your petitioners, the common council of the city of Hammond, state of Indiana, represent to your honorable body that the following territory which they desire annexed to said city is unplatted and contiguous to said city, viz:

Beginning at a point on the Indiana and Illinois state line, which point is the south-west corner of section No. thirteen (13), in township thirty-seven (37) north, range ten (10) west of the second principal meridian; thence running easterly along the south line of section eighteen (18), in township thirty-seven (37) north, range nine (9) west of the second principal meridian, to the south-west corner of said section eighteen (18); thence running northerly along the east line of said section eighteen (18) and along the east line of section seven (7), in same township and range, to the north-east corner of the south-west quarter ($\frac{1}{4}$) of said section seven (7); thence running westerly along the north line of the south-east quarter of said section seven (7) to the north-west corner of said south-east quarter ($\frac{1}{4}$) of said section seven (7); thence running northerly along the east line of the north-west quarter ($\frac{1}{4}$) of said section seven (7) and along the east line of the west half ($\frac{1}{2}$) of section six (6), in township thirty-seven (37) north, range nine (9) west of the second principal meridian, to the intersection of said line with the meander line of the south shore of Lake Michi-

gan; thence running north-westerly along the meandering of the south shore of said lake, to the intersection of said meander line with the Indiana and Illinois state line; thence running southerly along said state line to the place of beginning.

A plat of said territory, of which the above is an accurate description is herewith presented to your honorable body.

Your petitioners assign as reason why said territory should be annexed to said city, that the same is thickly settled and requires better police surveillance than can be secured without municipal control, that the highways running through the country north of said city through said territory to said city, upon which there is much travel, requiring them, by a reason of such amount of travel, to be kept in better repair than they are kept in; that said city in order to afford greater fire protection and water privileges to said city have constructed at an outlay of about one hundred thousand dollars ($100,000) a system of water works. The pump house and machinery of which and about five miles of sixteen (16) inch water pipe is located in and upon said territory sought to be annexed, and outside the present city limits, and the city desires it within said city so as *to* afford it better care and protection. That said city is growing so rapidly that it needs the said territory for the purpose of permitting citizens to build upon who wish to become citizens of said city that the owners of the land within the territory sought to be annexed, receive the benefits of said city without paying any taxes therefor, and their lands are greatly increased in value by their proximity to said city.

Your petitioners hereby authorize the city attorney to

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Your petitioners hereby authorize the city attorney to

present this petition to your honorable body, and pray that you will annex said territory to said city, and extend the jurisdiction of said municipal corporation over said territory.

P. REILY, PETER WOLF,
J. F. KUHLMAN, J. SCHLAER,
PETER MOSER, JACOB KASPER.

I, Alexander Hess, Clerk of the Supreme court, do hereby certify that the above and foregoing is a true and complete copy of the resolution of the Common Council of Hammond to petition the County Board in the case of *Oliver O. Forsythe, et al.* v. *The City of Hammond*, cause No. 17,275, as appears on file with the record in my office.

WITNESS my hand and seal of said court at my office in Indianapolis, this 16th day of September, 1896.

SEAL OF THE STATE OF INDIANA.

ALEX. HESS,
Clerk Supreme Court.

EXHIBIT B.

STATE OF INDIANA, SUPREME COURT.

Oliver O. Forsyth *et al.*,
vs.
City of Hammond. } *No. 17,275.*

I, Alexander Hess, Clerk of the Supreme court, certify that the record in the above entitled cause contains no resolution of the Common Council of the said city, resolving to annex the territory in dispute in said case.

IN WITNESS WHEREOF, I hereto set my hand and affix the seal of said court in the city of Indianapolis, this 1st day of October, 1896.

SEAL OF THE STATE OF INDIANA.

ALEX. HESS,
Clerk Supreme Court.

164-706

Office Supreme Court, U. S.
FILED.
OCT 12 1896
JAMES H. McKENNEY,
CLERK.

164-706

Supreme Court of the United States.

OCTOBER TERM. A. D. 1896.

IN THE MATTER OF THE APPLICATION OF THE CITY OF HAMMOND FOR A WRIT OF CERTIORARI

IN THE CASE OF

615

CAROLINE M. FORSYTH, *Appellant*,

vs.

THE CITY OF HAMMOND AND WILLIAM KLEIHEGE, TREASURER OF THE CITY OF HAMMOND, *Appellees.*

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

W. H. H. MILLER,
FERDINAND WINTER,
JOHN B. ELAM,
Attorneys for Respondent.

THOMAS J. MERRIFIELD,
Of Counsel.

ENGLE PRINT, 16 N. DELAWARE.

IN THE

Supreme Court of the United States.

OCTOBER TERM 1896.

In the Matter of the Application of the CITY OF HAMMOND for a writ of *certiorari* in the case of
CAROLINE M. FORSYTH, *Appellant*,
vs.
THE CITY OF HAMMOND, and
WILLIAM KLEIHEGE; Treasurer of said City of Hammond, *Appellees*, in the United States Circuit Court of Appeals for the Seventh Circuit.

There are in this matter only three principal questions to be considered.

1. Is this a proper case for *certiorari?* That question we leave upon Mr. Merrifield's brief.

2. Is the annexation of territory to a municipal corporation a legislative or judicial function?

3. Is this question open to decision in the Federal Courts on its merits, or is it foreclosed by the decisions of the State Courts of Indiana?

As the first step let us get at the precise State of the record.

On the 30th day of April, 1895, Caroline M. Forsyth filed her bill in chancery in the Circuit Court of the United States for the District of Indiana against the appellees the City of Hammond and William Kleihege. An appearance having been entered to said bill, on the 1st day of May, 1895, complainant filed her amended bill which is found on page 45 of the petition for the writ of *certiorari* filed by appellees in this Court.

STATEMENT OF FACTS IN AMENDED BILL.

By their amended bill it appears, after proper averments of citizenship, that complainant is the owner of some 725 acres of land in Lake County, Indiana; that by a proceeding instituted at the June session, 1893, of the board of commissioners of Lake County, the City of Hammond sought to annex said lands, with others, to said municipal corporation; that the decision of the board of commissioners was adverse to such annexation; that thereupon the city took a pretended appeal from such decision to the Lake Circuit Court, and thence said case having been transferred by change of venue to the Porter Circuit Court, a jury trial was had, resulting in a verdict and judgment making such annexation, and said City now claims and pretends to exercise jurisdiction over said lands, and in the assertion of such claim has levied taxes for the year 1894 against the same amounting to three thousand five hundred dollars, and said Kleihege, treasurer, is threatening to collect the same by the sale of said lands as well as by the levy, distraint and sale of personal property.

Upon this state of facts, complainant avers that said pretended appeal from the desision of the board of commisioners was without warrant of law, and

the proceedings therein had void, for the reason that the annexation of territory to a city is a matter of legislative and not of judicial cognizance, and it was not competent for the legislature to commit the determination of the question to a judicial tribunal. The change of venue was also void; and hence neither the Lake nor Porter circuit court acquired any jurisdiction of the subject matter.

2d. The amended bill also alleges that at the time of the institution of said annexation proceedings a strip of land about a quarter of a mile wide, being a part of East Chicago, intervened between the City of Hammond and the lands so sought to be annexed, and therefore said lands were not contiguous to said city.

3d. The bill alleges that certain parts of said lands so sought to be annexed had already been laid off and platted into lots adjoining the city of Whiting, solely with reference to that town and being distant from Hammond four to five miles; also a certain other tract had been laid off into lots contiguous to South Chicago, and that by reason of such platting said territory was not subject to be annexed in the proceeding above referred to.

4th. That at the time said annexation proceedings were commenced the municipal debt of said City of Hammond amounted and still amounts to about twice the constitutional limit, or near four per cent. of its taxables, and the purpose of the annexation was to so increase the taxables of the city as to bring the debt within the constitutional limitation upon municipal indebtedness in Indiana, viz.; two per cent, and this without any regard to benefit or advantage to the property to be annexed.

It is also alleged that the city is about to commingle the moneys so collected, or sought to be collected, with other city funds and to use the same in payment of its debt accumulated in excess of the constitutional limit and in payment of ordinary municipal expenses, but that no part of the same is to be expended upon complainant's property or in a way to be of any advantage thereto.

5th. That complainant's lands are used only for pasturage, hay and agricultural purposes; that their annual rental value does not exceed one dollar per acre; that they have no market value; that their value is speculative and prospective only and in no degree helped by being in the neighborhood of Hammond, but on the contrary the taxation of said lands by said city would greatly depreciate and render them unsalable; that the taxes assessed amount to five dollars per acre, the same being upon a valuation of two hundred and fifty to five hundred dollars per acre, which is enormously in excess of the cash value of said lands, and said taxes are exorbitant, oppressive and extortinate; that there are very few houses on the lands; that they are four and one half miles distant from any police station, fire engine house or gas lamp of the City of Hammond, so that in the nature of things complainant can not receive any advantage from the municipal government of said city; that at the time such proceedings were instituted the population of Hammond was six to seven thousand people, and its territory was then three miles in length north and south and two miles east and west, being about 4,400 acres; that the northern frontier of said city consists of sections 24 and 19 or about two square miles of land, neither of

which, nor any part thereof, has ever been laid off into lots or blocks, one of said sections having not a single house or road upon it, and the other having but seven houses and one road; that these two vacant sections lie between any settled part of said city and the lands of complainant; that the territory already included within the city is vastly larger than will be required for any city purposes for many years; that the territory attempted to be annexed consists of about five square miles of practically vacant lands lying directly north and extending all the way from the northern limits of the city to the shore of Lake Michigan; that immediately on the north of the city are Wolff Lake and Lake George, whose shores and margins are low and marshy, and between these two lakes is a narrow neck of land low and swampy, about one mile long extending north and south along which is a low, usually muddy road which is the only direct route from the City of Hammond to the property of value in the disputed territory, the most valuable part of which is that furthest north and nearest to the City of Chicago and most remote from the City of Hammond; that the business part of Hammond is between four and five miles from the valuable part of this territory, and the only direct means of communication between the two is the road above described. Said lands, as before stated, are used only for agricultural purposes, and the few persons who live or work thereon have no occasion for and can get no possible benefit from municipial government; that the effect of annexation is to greatly depreciate the value of these lands, and prevent their sale; that said attempted annexation was called for by no public interest or any legitimate city purpose,

but was an abuse and violation of the franchises of the city and a contemplated fraud under the cloak of the law of the state for the unlawful and corrupt purpose (on the part of the city) to subject said lands to the burdens of city taxation, as above set forth.

PRAYER for perpetual injunction and temporary restraining order.

The circuit court refused to grant any injunction and dismissed the bill for want of equity. From this action of the circuit court complainant appealed to the Circuit Court of Appeals, which reversed the action of the circuit court.

MATTERS NOT IN RECORD.

It will be seen by a comparison of this statement of the contents of the amended bill, or by an examination of the bill itself (Pet. for *Certiorari*, p. 45), that counsel for the petitioners in their purported statement of facts seek to bring into the consideration of this case many matters which were not in the bill in the circuit court or in the record before the Circuit Court of Appeals. Nothing was before either court except the contents of the amended bill. There was in that bill, or in that record, not one word in reference to proceedings in the Supreme Court of Indiana, and, as a consequence, nothing that was done by that court could be considered by either of those courts, or can be considered by this court, except as other decisions of that court made between other parties are considered in determining the law of Indiana.

It will also be observed that for some reason best known to themselves, the counsel for the petitioner have set forth in their petition what purports to be a letter addressed by the mayor of Hammond to

the Governor of Indiana, and the reply of the latter. See Pet. pp. 96 and 99.

Inasmuch as up to the time these letters were written no injunction had been granted, and at the express request of the counsel for the appellees, being the same gentlemen who represent them in this petition,—the Circuit Court of Appeals had expressly directed the mandate to be withheld, with a view to giving an opportunity for this very proceeding, it will perhaps not be difficult to divine the motive behind this correspondence; and from what is known of its authors, the writing and publication of these letters ought not and does not, cause any surprise, though as much can not be said with reference to the attempted injection of the same into the record in this case. Were it not that we have the very highest respect for the learned counsel who framed this petition, we would be tempted to suggest that from another noted and picturesque document formulated in the City of Chicago in the same month of July by Govenor Matthews and other distinguished gentlemen, some very pertinent extracts might be made upon the subject of States' Rights, government by injunction and usurpation by the federal courts, and they would be quite as appropriate to the matter under discussion in this case as this correspondence.

In connection with the attempt to bring this correspondence into the record, and the denunciation of the opinion of the Circuit Court of Appeals as "revolutionary and dangerous in all its tendencies", personal protestations, however sincere, (and we believe they are entirely sincere), in the brief for petitioner, of the writer's personal abhorrence of the "demagogues" who indulge in the same sort of

language in party platforms and at the hustings, will count for little.

The decision of the Circuit Court of Appeals is a correct exposition of the law or it is not. If it is correct, it should be enforced; if it is not, a mistake has been made by the judges of that Court, and a way, a peaceable way, will be found to rectify that mistake. In either event, the talk of "resort to force" in the correspondence, and of the opinion being "revolutionary and dangerous" in the brief, seems to us, to put it mildly, quite irrelevant.

Article 3 of the Constitution of Indiana reads as follows:

> The powers of the government are divided into three separate departments; the Legislative, the Executive, including the Administrative, and the Judicial; and no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in this Constitution expressly provided.

STATUTES PROVIDING FOR ANNEXATION.

The annexation proceedings alluded to in the bill were instituted under the Act of March 14, 1867, touching the incorporation of cities, and prescribing their powers. (See Burns' R. S. 1894, Vol. 2, Secs. 3658, 3659, 3660). So much of the act as affects this case is as follows:

> 3658. EXTENSION OVER PLATTED LOTS—84. Whenever there shall be or may have been lots laid off and platted adjoining such city, and a record of the same is made in the recorder's office of the proper county, the common council may, by a resolution of the board, extend the boundary of such city so as to include such lots, and the lots thus annexed shall thereafter form a part of such city and be within the jurisdiction of the same. The common council shall immediately thereafter file a copy of such resolution, defining the metes and boundaries of such addition, in the office of the recorder aforesaid; which shall be recorded.

3659. EXTENSION OVER CONTIGUOUS LANDS—ACTION OF COUNCIL.—85. The limits of any city may be extended over any lands or contiguous territory, by the consent of the owner thereof in writing, and a resolution of the common council, passed by a two-thirds' vote, extending the limits of such city over such lands or territory; which written consent and resolution shall be entered at length in the records of such city; and the common council shall cause a certified copy of both to be recorded in the recorder's office of the proper county. If any city shall desire to annex contiguous territory not laid off in lots, and to the annexation of which the owner will not consent, the common council shall present to the board of county commissioners a petition setting forth the reasons of such annexation, and at the same time present to such board an accurate description by metes and bounds, accompanied by a plat of the lands or territory proposed or desired to be annexed to such city. The common council shall give thirty days' notice, by publication in some newspaper of the city of the intended petition, describing in such notice the territory sought to be annexed.

SEC. 86. The board of county commissioners, upon the reception of such petition, shall consider the same, and shall hear the testimony offered for or against such annexation, *and if after the inspection of the map and of the proceedings had in the case, such board is of the opinion that the prayer of the petition should be granted*, it shall cause an entry to be made in the order book specifying the territory to be annexed, with the boundaries of the same, according to the survey, and they shall cause an attested copy of the entry to be filed with the recorder of such county, which shall be duly recorded in his office, and which shall be conclusive evidence of such annexation in all courts of this State.

[This last Section is *not* found in petitioner's brief.]

The city's attempt to appeal from the refusal of the commissioners to grant its petition in the Lake Circuit Court, was made under an act in force May 31, 1879. (R. S. 1894, Vol. 1, Secs. 4224–4227), which is as follows:

4224. APPEAL FROM COUNTY BOARD—1. In proceedings before the board of county commissioners for the annexation of territory to cities and towns against the will of the owner, the petitioner and the owner of any portion of the territory proposed to be annexed may appeal to the circuit court from the final deci-

language in party platforms and at the hustings, will count for little.

The decision of the Circuit Court of Appeals is a correct exposition of the law or it is not. If it is correct, it should be enforced; if it is not, a mistake has been made by the judges of that Court, and a way, a peaceable way, will be found to rectify that mistake. In either event, the talk of "resort to force" in the correspondence, and of the opinion being "revolutionary and dangerous" in the brief, seems to us, to put it mildly, quite irrelevant.

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STATUTES PROVIDING FOR ANNEXATION.

The annexation proceedings alluded to in the bill were instituted under the Act of March 14, 1867, touching the incorporation of cities, and prescribing their powers. (See Burns' R. S. 1894, Vol. 2, Secs. 3658, 3659, 3660). So much of the act as affects this case is as follows:

> 3658. EXTENSION OVER PLATTED LOTS—84. Whenever there shall be or may have been lots laid off and platted adjoining such city, and a record of the same is made in the recorder's office of the proper county, the common council may, by a resolution of the board, extend the boundary of such city so as to include such lots, and the lots thus annexed shall thereafter form a part of such city and be within the jurisdiction of the same. The common council shall immediately thereafter file a copy of such resolution, defining the metes and boundaries of such addition, in the office of the recorder aforesaid; which shall be recorded.

3659. EXTENSION OVER CONTIGUOUS LANDS—ACTION OF COUNCIL—85. The limits of any city may be extended over any lands or contiguous territory, by the consent of the owner thereof in writing, and a resolution of the common council, passed by a two-thirds' vote, extending the limits of such city over such lands or territory; which written consent and resolution shall be entered at length in the records of such city; and the common council shall cause a certified copy of both to be recorded in the recorder's office of the proper county. If any city shall desire to annex contiguous territory not laid off in lots, and to the annexation of which the owner will not consent, the common council shall present to the board of county commissioners a petition setting forth the reasons of such annexation, and at the same time present to such board an accurate description by metes and bounds, accompanied by a plat of the lands or territory proposed or desired to be annexed to such city. The common council shall give thirty days' notice, by publication in some newspaper of the city of the intended petition, describing in such notice the territory sought to be annexed.

SEC. 86. The board of county commissioners, upon the reception of such petition, shall consider the same, and shall hear the testimony offered for or against such annexation, *and if after the inspection of the map and of the proceedings had in the case, such board is of the opinion that the prayer of the petition should be granted*, it shall cause an entry to be made in the order book specifying the territory to be annexed, with the boundaries of the same, according to the survey, and they shall cause an attested copy of the entry to be filed with the recorder of such county, which shall be duly recorded in his office, and which shall be conclusive evidence of such annexation in all courts of this State.

[This last Section is *not* found in petitioner's brief.]

The city's attempt to appeal from the refusal of the commissioners to grant its petition in the Lake Circuit Court, was made under an act in force May 31, 1879. (R. S. 1894, Vol. 1, Secs. 4224–4227), which is as follows:

4224. APPEAL FROM COUNTY BOARD—1. In proceedings before the board of county commissioners for the annexation of territory to cities and towns against the will of the owner, the petitioner and the owner of any portion of the territory proposed to be annexed may appeal to the circuit court from the final deci-

sion of the board, by filing within thirty days, with the auditor, a bond or undertaking for the due prosecution of the appeal and payment of all costs that may be adjudged against the appellant, with sureties, to be approved by the board or the auditor. But no appeal shall be dismissed for the want of a sufficient bond or undertaking, if one shall be filed, under the direction of the court, at any time before trial.

4225. AUDITOR'S DUTY—2. Within twenty days after filing the appeal bond or undertaking, the auditor shall deliver it, with all the other papers in the cause and a complete transcript of the proceedings of the board, to the clerk of the circuit court, who shall docket it with the other causes pending therein.

4226. TRIAL—3. The appeal shall stand for trial, when taken during the session of the board, at the first term after the papers shall have been filed ten days, and, when taken in vacation, at the first term after summons shall have been served upon the appellee ten days before the first day of such term. The appeal shall be tried and determined as an original cause.

4227. EFFECT OF APPEAL—4. All further proceedings in the annexation of territory shall be suspended until the final disposition of the appeal. The court may make a final determination of the proceeding and compel its execution, or may send its decision to the board, with direction how to proceed, and require compliance.

ARGUMENT.

This brief is designed to supplement the more full and elaborate argument filed herein by our associate.

The cardinal questions in the Circuit Court of Appeals, and in this Court, if it shall grant the writ of *certiorari* and entertain jurisdiction, are two:

1. Is the annexation of territory to a municipality under the law as it is to be administered in Indiana a judicial or a legislative function?

2. Was the Circuit Court of Appeals, and is this Court, foreclosed by the action of the courts of Indiana from a consideration of this question upon its merits?

I.

In as much as the opinion of Judge Howard overruling the petition for a rehearing in Forsyth v. Hammond, 142 Ind. 516, concedes, as do counsel for petitioner in this case, that the annexation of territory to a city is a legislative function, it is not necessary to spend much time upon that question. There are, however, two or three considerations which may be suggested:

First. It is of the essence of judicial decision that it settles the question decided. A judgment of a judicial tribunal in a proceeding *inter partes* under our system of government, can not be reversed by legislative action. Yet we suppose that neither counsel for petitioner, nor any one else, would deny that the legislature of Indiana might by an act disannex every foot of this territory at once.

Upon this question Judge Baker, in his opinion on page 58 of this Petition, says:

> I should perhaps feel constrained to yield to the force of the reasonings of these authorities (adjudging that this is a legislative power) if the constitution of this state conferred power on the legislature to create such municipal bodies or to enlarge or contract their boundaries by the enactment of special laws applicable to each particular municipal body. Such power, however, is denied to the legislature by the constitution of the state. The constitution requires the organization of cities and towns and the enlargement and contraction of their boundaries to be provided for and regulated by general laws.

In other words, he seems to be of the opinion that annexation, and therefore disannexation, can only be provided for by general law. In this we think it easily demonstrable that Judge Baker was in error.

If the constitution of Indiana imposes any such limitation, it must be found in either one of two sec-

tions, as there are no others having any bearing upon the question. Section 22 of Article 4 reads:

> The general assembly shall not pass local or special laws in any of the following enumerated cases, that is to say:

Then follow seventeen specifications, and Court and counsel will look in vain for a word in any of them at all bearing upon this question.

Section 13 of Article 11 reads as follows:

> Corporations other than banking shall not be created by special act, but may be formed under general laws.

This is not a question of the creation of a corporation, but of the annexation of territory to an existing corporation. We have no doubt that the original intention of this section of the constitution was that it should apply only to private corporations, and this is, as we think, clearly shown by the following section, 14:

> Dues from corporations other than banking shall be secured by such individual liability of the corporators or other means as may be prescribed by law.

Indeed, every section of Article 11 by its terms shows that it was framed with the intention that it should apply to private moneyed corporations, only, and not to municipal corporations at all. But, as our Supreme Court has, as we think by a clear mistake, held otherwise, (Corporation of *Bluffton* v. *Studebaker*, 106 Ind, 129), we do not press that matter, but we do say that the language of Section 13 can not by any interpretation or construction, or by anything short of judicial legislation, be made to apply to the *annexation of territory* to a municipal corporation. This being so, Judge Baker's premises being gone, his argument falls. Section 23 of Article 4 of our constitution reads:

> In all the cases enumerated in the preceding section, and in all other cases where a general law can be made applicable, all laws shall be general and of uniform operation throughout the State.

Under this section it has been held over and over again that the legislature is the sole judge whether a general law can be made applicable, and if it chooses to enact a special law on any subject not covered by any of the specifications of Section 22, or other special prohibitions of the constiiution, its judgment in that matter can not be questioned and the act is valid.

Gentile v. *State*, 29 Ind. 409.
Wiley v. *Bluffton*, 111 Ind. 152.
State v. *Kolsem*, 130 Ind. 434.
Mode v. *Beasley*, 143 Ind. 306.

It is of course unnecessary to cite authorities to the proposition that except as restricted by the Constitutions, State and Federal, the legislature of Indiana has authority as plenary in the enactment of statutes special as well as general as the Parliament of Great Britian.

We submit, therefore, that the legislature of Indiana may annex to and disannex territory from any muicipality by special or general law at its will.

But Judge Howard in the opinion above referred to, 142 Ind. 516, says:

> It may be conceded that annexation of territory to a city is a legislative function. This function is exercised by the common council when it resolves to annex certain described lands to a city and to present a petition therefor to the county board.

If this statement were not found in a judicial opinion, it would be difficult to believe that it was made in real earnest. Let us examine it a little.

1st. It is of the essence of legislative action, whether by the supreme law-making power directly, or by any of the agencies to which such power may be delegated, that when action is taken it shall decide something, and *pro tanto* have the force of law. The legislature enacts laws; it does not petition somebody to enact laws. The common council of a city, in its legislative capacity, enacts ordinances. which are laws; it does not petition somebody to enact ordinances. The board of county commissioners, in so far as it exercises legislative functions, makes regulations that have the force of law. It does not, in exercising such functions, simply petition. When any party enters a tribunal as a petitioner, it is a contradiction in terms to say that it exercises a legislative function.

2nd. By Section 84 of the Act of 1867, R. S. 1894, Sec. 3658 (R. S. 1881, Sec. 3195), the legislature delegates to the common council the legislative power by resolution to extend the boundary of the city over *platted* grounds.

By the first part of Section 85, the same legislative power is delegated to the common council by resolution to bring within the city unplatted lands to the annexation of which the *owners consent.*

By the last part of Section 85, under which these proceedings were had, it is provided that if the common council desires to annex contiguous territory not laid off into lots and to which consent is not given, it may simply file a petition with the board of commissioners to that end; and Section 86 provides that the board of commissioners shall examine the papers, hear the evidence, "and if after inspection of the map and of the proceedings had in

the case, *such board is of the opinion that the prayer of the petition should be granted*, it shall cause the entry of annexation to be made."

Does the common council exercise the same sort of a function in each of these three cases? In the first two it settles and determines, as the representative of the sovereign legislative authority, the question of annexation. In the third it appears simply as a party petitioning, and according to the whole theory of the petitioner in this case it stands as a party litigant, asking the board to grant its prayer, itself determining nothing and having the right to appeal; in short, having the standing of any other party litigant, no more and no less. And yet it is said that the common council exercises the legislative discretion provided for in the last part of Section 85, when it files its petition. It is perfectly clear that the legislative purpose was to grant to the common council a legislative discretion to annex platted lands with or without consent; to annex unplatted lands with consent; and that it was equally the purpose to withhold from the common council any such legislative discretion or power as to unplatted lands where such consent was not given.

We submit, therefore, that, so far as this branch of the case is concerned, the quotation from the opinion of Judge Howard is a confession of error.

3d. The legislature can not confer on the circuit court by appeal a power or function which it could not confer directly. In an appeal from the board of commissioners to the circuit court in every case

the trial is *de novo*. Section 7864 R. S. 1894 (5777 R. S. 1881) reads:

> The appeal shall be tried and determined as an origina cause.

The question to be determined, therefore, in this case was whether, if the legislature had attempted to confer upon the circuit court in the first instance the legislative power to annex territory to a city, such a grant would have been valid under the three-fold division of our governmental powers. If it would not, then such a grant can not be made valid by reason of the fact that it is first made to the board of commissioners and thence taken into the circuit court by appeal.

4th. A power or function of government under our system can not at the same time be legislative and judicial. It must be one or the other. If it is a legislative function, it can not be exercised by the courts, and, *vice versa*.

Nor, in determining whether it is one or the other, is the inhibition against special legislation (assuming it to exist for the sake of the argument) of any significance. In the absence of such inhibition, it is conceded by Judge Baker and our opponents, that the legislature might annex or disannex territory at will by direct legislation. If so, it is because the subject matter is of legislative cognizance. If the matter were judicial in its nature it could not be subject to legislative action, whether by special or general laws, and, if a legislative function, it can not be made judicial by a prohibition against special legislation.

That it is a purely legislative function and that the Indiana statute so treats it in so far as any dis-

cretion is to be exercised, is, we submit, clearly shown by the argument and citations in Mr. Merrifield's and in this brief.

That the legislature might so frame a law as to leave nothing to discretion, but make the annexation result from the judicial ascertainment of certain facts, we do not doubt. Such was the law under which the Grusenmeyer case was decided, as clearly shown in the opinion of Judge Woods in this case.

Without further discussion of this question on principle we submit that the text writers are all one way, and with most of the decided cases, support our contention that the annexation of territory to a municipal corporation as well as the fixing of the boundaries of states and nations is a matter of political or legislative cognizance.

Beach Pub. Corp. Vol. I, Sec. 80, says:

> The power is thus clearly legislative, and it is, in general, incapable of being delegated. In that it is legislative it can not be conferred on the judiciary. The courts can not then determine to what extent a city can acquire additional territory, or whether it can or can not acquire it, except in so far as such questions might arise in construing and interpreting the city charter.

To the same effect are

Dillon Mun. Corp. Sec. 9,
Cooley Con. Lim. (4th Ed.) 232,
Stone v. *Charleston*, 114 Mass. 220,
People v. *Bennett*, 29 Mich. 451,
Galesburg v. *Hawkinson*, 75 Ill. 152,
People v. *Town of Nevada*, 6 Cal. 143,
In re Town of Union Mines, 19 S. E. 398 (W. Va.)

In *Stilz* v. *City of Indianapolis*, 55 Ind, 515, a case involving this very statute, Judge Biddle speaking for the court, says: "We hold, however, that

the statute should be strictly construed *because it is a delegation of legislative power*, but not impracticably strict."

The legislature may enlarge or contract such boundaries at will.

Laramie Co. v. *Albany Co.*, 92 U. S. 310,
3 Kent Com. 305,
Angell & Ames, Sec. 31,
Mckin v. *Odom*, 3 Bland 407,
St. Louis v. *Allen*, 13 Mo. 400,
The School v *Tatman*, 13 Ill. 27,
Yarmouth v. *Skillings*, 45 Me. 141.

It has long been firmly settled that the charters of public corporations may be repealed or altered as the legislature in the exercise of its constitutional powers deems proper.

Cooley on Lim. (4th Ed.) 129,
Sloan v. *The State*, 8 Blackf. 361,
Meriwether v. *Garrett*, 102 U. S. 472,
Coffin v. *State*, 7 Ind. 157,
1 Dillon Mu. Corp. (4th Ed.) Secs. 61, 63, 71.

That the fixing of boundaries is not a judicial but is a legislative or political function is well settled in this court.

Jones v. *United States*, 137 U. S. 202,
Foster v. *Neilson*, 2 Pet. 253,
In *re* Cooper, 143 U. S. 472.

That it is not permissible for the courts under the Constitution of Indiana to exercise legislative functions is well settled.

State v. *Kolsem*, 130 Ind. 442,
Wright v. *Defrees*, 8 Ind. 298,
State v *Noble*, 118 Ind. 350,
State v. *Denny*, 118 Ind. 382,

Hovey v. *The State*, 127 Ind. 588,
Hancock v. *Yaden*, 121 Ind. 366,
State v. *Haworth*, 122 Ind. 462.

This proposition is equally well settled by the decisions of this and other courts.

Legal Tender Cases, 12 Wall. 457,
Grenough v. *Grenough*, 11 Pa. St. 487.

It is also well settled that the legislature can not grant an appeal to the courts from the action of a subordinate board in a matter of legislative discretion.

Hanna v. *The Board*, 29 Ind. 170,
Moffett v. *The State*, 40 Ind. 220,
Alexander v. *Gravel Road Co.*, 44 Ind. 436,
Moats v. *City of Detroit*, 18 Mich. 495,
Owners v. *Mayor*, 15 Wend. 374,
Bunnell v. *Board*, 124 Ind. 1,
Farley v. *Board*, 126 Ind. 468,
Fort Wayne v. *Cody*, 43 Ind. 200,
Commonwealth v. *Woods*, 44 Pa. St. 113,
State v. *Kolsem*, 130 Ind. 441.

II.

It is claimed by Petitioners that the Circuit Court of Appeals erred in holding that the judgment of the Porter Circuit Court, as affirmed by the Supreme Court, could be disregarded, because, it is said, that whatever objection existed to the judgment appeared on the face of the record, and that in such case it is not competent for any other court than the one which enters the decree or judgment to revise or annul such judgment. The answer to this is very simple.

The complainant did not seek to have such judgment or decree revised or annulled, nor did that Court

revise or annul the same. It simply disregarded the judgment of the State court, in so far as it decreed annexation, as being void for want of jurisdiction of the subject matter.

The proposition that, when it appears on the face of the record that the court rendering a judgment had no jurisdiction of the subject matter, such judgment is unimpeachable in any other court, although, if it were only impeachable upon evidence *dehors*, another court might collaterally assail the same is certainly startling.

If the Criminal Court of Marion County, Indiana, which by express provision of the statute has no jurisdiction except in criminal proceedings, were to entertain a complaint for a divorce and grant such divorce, rendering a judgment for alimony, and execution were to be issued for the enforcement of that judgment, the proposition of the learned counsel for for the appellee is that neither the federal court nor any other State court could enjoin such execution, or could quiet title as against such judgment, because the nullity of the judgment would appear upon the face of the record.

Or, to reverse the case, if the Superior Court of Marion County, which has no criminal jurisdiction, were to entertain an indictment for assault and battery, find a defendant guilty, and impose a fine which it was sought to enforce against his property, it would not be competent for the Circuit Court or the federal court, in a proper case, to enjoin the execution of such judgment, because its nullity would appear on the face of the record.

Or, again, if the Superior Court which has no jurisdiction in libel or slander were to entertain such

action and render judgment for five thousand dollars damages, all the facts as to the character of the cause of action appearing on the face of the record, such record could not be assailed collaterally!

We respectfully submit that such a contention is wholly untenable, and has the sanction of no court.

In citing the Little Rock case, 66 Federal Reporter 83, counsel seem to ignore the distinction between a lack of jurisdiction of the subject matter, which depends upon the law and is incurable, and a lack of jurisdiction of the person, which depends upon facts alleged, and upon which, the trial court is compelled to find, and upon which, therefore, the conclusion of the trial court may be unimpeachable. As shown by the brief of our colleagues in opposition to this petition, the Little Rock decision is defensible upon two grounds:

1st. That, notwithstanding the absence of statutory proof, the finding of the court is that the fact of publication existed; and

2d. That there was a complete remedy at law.

It is not believed that Judge Thayer, speaking for himself and Judge Caldwell, intended to go further than this. It is certain, from his concurring opinion, that Judge Sanborn did not.

It is equally certain that the opinion of Mr. Justice Bradley, in *Barrow* v. *Hunton*, 99 U. S. 80, does not at all warrant any wider conclusion than this. In that case the proceeding was a direct attack to annul the judgment, or, as the learned Justice says, a proceeding of "nullity" under the Louisiana statute. Whether a federal court may annul and wipe out a judgment of a State court involves a very different proposition from the ques-

tion whether it may disregard such judgment as a nullity, where it appears that the State Court had no jurisdiction of the subject matter, or where its judgment or decree exceeded its powers.

As the question at issue in this case is not one of fraud, not one of jurisdiction of parties, not one of the power of one court to review the action of another, but is solely a question of the jurisdiction of the latter court over the subject matter of its decree, the other cases cited by petitioner under this head need no attention.

As all lawyers know, the rule of the common law was that the courts of chancery would not entertain a bill to quiet title against an instrument or judgment void upon its face, because, the nullity of such instrument appearing, it might be disregarded in any collateral proceeding. But even this rule would not obtain under the statutes of Indiana.

R. S. 1881, sec. 1070.

That a pretended judgment or decree in any case where the record shows the absence of jurisdiction of the subject matter may be thus disregarded in any court and everywhere, is, as we understand, elementary. Certainly, neither of the decisions cited by counsel for appellees asserts or attempts to maintain the contrary.

III.

The second contention of counsel for petitioners amounts to this: the opinion of the Circuit Court of Appeals concedes that for certain purposes the Porter Circuit Court obtained jurisdiction of the matters in controversy between the property owners and the City of Hammond, and, the Porter Circuit Court being a court of general jurisdiction and hav-

ing assumed to act upon the whole controversy, therefore its action is beyond question, by reason of the presumtions that attach to the record of such a court.

The first suggestion we have to make in response to this contention is that it rests upon a false premise, namely, that the Porter Circuit Court in this matter was sitting as a court of general jurisdiction.

The Board of Commissioners of Lake County in this matter was a special tribunal, exercising special, specific, statutory powers. It was not a court of common law, but only a tribunal of statutory jurisdiction. From its actions upon certain questions an appeal was allowed to the circuit court, and it is provided that such appeal shall be heard, tried and determined as an original cause.

R. S. 1894, Sec. 7864;

R. S. 1881, Sec. 5777.

That is, as we understand, so far as jurisdiction by appeal is conferred at all, the matter shall be heard as if upon original petition in that court. But what would be the nature of such a proceeding in that court? The annexation of territory to a city is not a proceeding according to the course of common law, but is purely statutory. The court, as far as it can act at all, for such purpose sits as a special tribunal, having limited statutory powers, and the rules applicable to its proceedings are the rules applicable to courts of limited, and not to courts of general jurisdiction.

Thus, in *Cowdrey* v. *The City*, 16 Federal Reporter, on page 533, it is said:

The rule is also inflexible that when a court or judicial officer exercises a special statutory power outside the scope of the usual jurisdiction of courts of general powers, the record of the proceedings must show that the statutory authority has been pursued; and in this regard the proceedings are on the same footing with those of courts of limited and inferior jurisdiction. *Denning* v. *Corwin*, 11 Wend. 647; *Thatcher* v. *Powell*, 6 Wheat. 119; *Dyckman* v. *New York*, 5 N. Y. 434; *Betts* v. *Bagley*, 12 Pick, 572; *Town of Huntington* v. *Town of Charlotte*, 15 Vt. 46; *Morse* v. *Presby*, 25 N. H. 299.

The same doctrine is laid down in the second volume of Cowan & Hill's Notes to Phillips on Evidence, Note 84, where it is said that there is no distinction in this particular between inferior courts and those of general jurisdiction.

This doctrine has the sanction of the Supreme Court of the United States in *Galpin* v. *Page*, 18 Wall. 350.

Also *The Guaranty Trust Company* v. *Green Cove R. R. Co.*, 139 U. S. 137; see pages 146,7 and 8.

Cheely v. *Clayton*, 110 U. S. 701;
Applegate v. *Lexington*, 117 U. S. 255;
Settlemier v. *Sullivan*, 97 U. S. 444;
Earle v. *McVeigh*, 91 U. S. 503;

See also

Henry v. *Carson*, 96 Ind. 412; 422 *et seq.*;
Pressly v. *Lamb*, 105 Ind. 171.

On page 196 of the last cited case, Judge Mitchell, in his dissenting opinion, says:

It is a rule in the federal court and many of the States that where a court of general jurisdiction exercises a special statutory power, which was not according to the course of the common law, its jurisdiction as to the subject matter and the person must affirmatively appear, and everything will be presumed to be without its jurisdiction which is not affirmatively shown to be within it. *Galpin* v. *Page*, 18 Wall. 350.

As before stated, it is too clear for argument that this proceeding for annexation was not a proceeding in the course of the common law, but was purely statutory and special. It is, therefore, as it seems to us, idle to contend that, because it was in the circuit court, jurisdiction is to be upheld, and that in the very teeth of the law.

As is said in *Dillard* v. *The Iron Company*, 1 Southeastern Reporter 124 (82 Virginia 738), there is no presumption of jurisdiction when its absence appears.

Or, as is said in *Settlemier* v. *Sullivan*, 97 U. S. 444, on pages 448-9, "we do not question the doctrine that a court of general jurisdiction acting within the scope of its authority—that is, within the boundaries which the law assigns to it with respect to subjects and persons—is presumed to act rightly and to have jurisdiction to render the judgment it pronounces until the contrary appears. But this presumption can only arise with respect to jurisdictional facts, concerning which the record is silent. It can not be indulged when the evidence respecting the facts is stated, or averments respecting them are made."

Much less can such presumption be indulged where the lack of jurisdiction of the subject matter is apparent, as matter of law, upon the face of the proceedings.

2d. It clearly appears that the Porter Circuit Court never acquired, or could acquire, jurisdiction to make this order of annexation.

Conceding that it had power to investigate and make a finding upon certain questions of fact, such as contiguity, whether the premises were platted or

not platted, etc., it is still plain that the utmost limit of its statutory power was to return the case to the board of commissioners, with its findings upon those questions, leaving the case still subject to final action in the discretion of that board. Section 7865 R. S. 1894 (5778 R. S. 1881) reads as follows:

> Such court may make a final determination of the proceeding thus appealed, and cause the same to be executed, or may send the same down to such board with an order how to proceed, and may require such board to comply with the final determination made by such court in the premises.

An examination of the cases decided under this statute will show, that the proper construction of this statute is, that the court may make a final determination and cause the same to be executed, or send the same to the board, not absolutely according to the discretion of the circuit court, but according to the nature of the case in hand. If the case be one in which there is nothing further for the board to do, a case, for instance, in which the court by appeal has jurisdiction over the entire controversy, it may make a final decree or judgment, and cause the same to be executed. On the other hand, where further action by the board is necessary, or where further action by the board depends upon the discretion lodged solely with the board, then all that the court can do is to send the case back to the board for such final action in their discretion.

Section 21 of the Act providing for laying out of highways (5021 R. S. 1881) reads as follows:

> If a majority of reviewers assess and report damages in favor of the objector, and the board shall consider the proposed highway, vacation or change to be of sufficient importance to the public, they shall order the costs and damages to be paid out of

the county treasury; but if a majority report against the claim for damages, the objector shall pay the cost; and when payment of damages is made as herein provided, such highway shall be recorded and ordered to be opened and kept in repair as hereinbefore provided, after notice to the proper trustees.

Construing this section in the case of *Jamieson, et al.*, v. *The Board*, 56 Ind, 466, a proceeding to open a highway, in discussing the question whether the board was a proper party, it is said:

> As we construe the law on this subject, the question as to whether the costs and damages shall be paid out of the county treasury or not is a question solely for the consideration and determination of the county board. "If the board shall consider the proposed highway", etc., "to be of sufficient importance to the public, they shall order the costs and damages to be paid out of the county treasury." This is the language of the statute on this subject, and in our opinion it leaves the matter entirely and exclusively within the discretion of the county board. No other court or tribunal is clothed with any jurisdiction over the subject, nor can any other court or tribunal compel the county board to consider any proposed highway to be of public importance or order the county board to "order the costs and damages to be paid out of the county treasury." In the location, opening, vacation or establishment of public highways the county board is merely a court to hear and determine, under and according to law, the rights of the parties litigant before it. In such cases as these, on an appeal from a decision of the county board to the circuit court, it can never be necessary, or even proper, in our opinion, to make the county board a party to the cause on such appeal. For if on such appeal the circuit court shall determine that any further action by the county board was required in the cause, it is provided in the 37th section of the act in relation to county boards, that the circuit court "may send the same down to such board with an order how to proceed, and may require such board to comply with the final determination made by such court in the premises."

Applying that language to the case at bar, no other court or tribunal is clothed with any jurisdiction over the subject of annexation so far as the same is committed to the legislative discretion of the

board, nor can any other court or tribunal compel any such board to be "of the opinion that the prayer of the petition should be granted." R. S. 1894, Sec. 3660 (1881 Sec. 3197); and, consequently, no other court can compel such board to cause an entry to be made in the order book, making such annexation; any such order, being thus made entirely without and beyond the scope of the authority granted to the circuit court, would be wholly unwarranted and void.

The same view of the law in this regard is taken in the *Board* v. *Small*, 61 Ind. 318.

So in *Sharp* v. *Malia*, 124 Ind, 407, a drainage case, on page 411, Judge Coffey, after citing numerous decisions, says:

> The rule to be deduced from all these cases would seem to be that where the appeal involves a particular matter embraced in one or more issues, it is the duty of the circuit court to try such matter *de novo* and to render a final judgment thereon, after which the cause may be remanded to the Board of Commissioners for further proceedings in accordance with such judgment.

In other words, it is apparent from these decisions that, while an appeal is granted in a highway case, yet the circuit court can only act upon certain questions. It can not at all act or bind the board of commissioners as to a matter of discretion, such as whether the costs and damages shall be paid out of the county treasury.

So in the case under consideration, conceding the jurisdiction of the circuit court for certain purposes, it could only make a finding and decree as to the questions of which it thus had jurisdiction, and was powerless to make any decree which should interfere with the discretion of the board of com-

missioners. That its decree or judgment, therefore, in excess of its powers was utterly void, and is not to be helped out by the fact that it was a court of general jurisdiction, is well established.

The discussion of this question by the Supreme Court of the United States in *Windsor* v. *McVeigh*, 93 U. S. 274, on pages 282 *et seq.*, is most instructive. It is said:

> Though a court may possess jurisdiction of a cause, of the subject matter and of the parties, it is still limited in its modes of procedure and in the extent and character of its judgments. It must act judicially in all things and can not then transcend the power conferred by the law. If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penitentary upon the defendant; if the action be for a libel or a personal tort, the court can not order in the case a specific performance of a contract. If the action be for the possession of real property the court is powerless to admit in the case the probate of a will. Instances of this kind show that the general doctrine stated by counsel is subject to many qualifications. The judgments mentioned in the cases supposed would not be merely erroneous; they would be absolutely void; because the court in rendering them would transcend the limits of its authority in those cases. See the language of Mr. Justice Miller to the same purport in the case of *Ex Parte* Lange, 18 Wall. 163. So it was held by this court in *Bigelow* v. *Forrest*, 9 Wall 351, that a judgment in a confiscation case, condemning the fee of a property was void for the remainder after the termination of a life estate of the owner. To an objection that the decree was conclusive that the entire fee was confiscated, Mr. Justice Strong, speaking the unanimous opinion of the court, replied: "Doubtless a decree of a court having jurisdiction to make the decree can not be impeached collaterally; but under the Act of Congress the district court had no power to order a sale which should confer upon the purchaser rights outlasting the life of French Forrest (the owner); had it done so, it would have transcended its jurisdiciion."

Again, in the same case, it is said:

> The doctrine stated by counsel is only correct when the court proceeds after acquiring jurisdiction of a cause according

to the established modes governing the class to which the case belongs, and does not transcend, in the extent or character of its judgment, the law which is applicable to it.

In the case of *United States* v. *Walker*, 109 U. S. 258, an administrator *de bonis non* sued the sureties on the bond of his predecessor in the trust, one of whom had died and the other of whom had been removed, to recover assets collected by such predecessor. In the Supreme Court of the District of Columbia, the surviving administratrix made a settlement, and, by an order of the court, was directed to turn over the moneys to the administrator *de bonis non*. Failing so to do, this action was brought. It was held that at the common law and under the law of Maryland, the administrator *de bonis non* was not entitled to the possession of moneys collected out of the estate of the decedent, the rights of the administrator *de bonis non* extending only to unadministered assets. It was contended, however, that the decision of the Supreme Court of the District, ordering the removed administratrix to account, was conclusive. This contention was denied, the court saying on page 266:

> Although a court may have jurisdiction over the parties and the subject matter, yet if it makes a decree which is not within the powers granted to it by the law of its organization, its decree is void.

And numerous cases are cited in support of the holding.

In view of this state of the law, it seems hardly necessary to combat the contention in the brief for the petitioners, to the effect that this court must presume that the Porter Circuit Court found in the record warrant for its assumption that the board of commissioners had exercised its legislative discre-

tion in favor of the annexation, notwithstanding the record in plain words shows the contrary. It is enough, in such a state of the record, that it was impossible for the Porter Circuit Court to make the judgment it did without exercising the discretion committed solely to the county board. That board had adjudged that the annexation should not take place. The circuit court attempted to adjudge that it should take place; in other words, it attempted to and did substitute, in direct violation of the law, its own discretion for that of the board of commissioners. It could not possibly make the decree it did without acting upon that question.

As heretofore stated, the State circuit court in this matter, in so far as it could act at all, was compelled to act as a court of original jurisdiction, and not as an appellate court. The statute (R. S. 1894, Sec. 4226, 1881, Sec 3246) reads as follows:

> The appeal shall be tried and determined as an original cause.

When the case gets into the circuit court, it is wholly immaterial what conclusion the board of commissioners may have reached. The circuit court is compelled to hear and determine every issue in the case for itself, and if any issue is involved whose solution it was not competent for the legislature to devolve upon a strictly judicial tribunal, then upon such issue the circuit court could not act at all; and such a question was the legislative or discretionary question as to the propriety of annexation committed by statute to the board of commissioners. With that question determined against annexation the circuit court was confronted. The fact that the board of commissioners had determined it in the

affirmative, if it had so appeared in the record, would not relieve the circuit court (assuming the statute to be valid) from the necessity of determining the question for itself, because it was compelled to try the case, so far as it tried it at all, *de novo*; and that it could not try this question at all, being a question committed solely to the discretion of the board and of a legislative character, is, as it seems to us, too clear for plausible argument to the contrary.

It might be that the circuit court might make a determination against the annexation, and so finally adjudge, because such judgment might be bottomed upon its finding that the property was not contiguous, or was platted, etc.; but, as before stated, a finding and judgment in favor of the annexation by the circuit court was a legal impossibility except by the affirmative exercise of the discretion committed only to the board of commissioners. In every such case the board is required to do two things: 1st. Ascertain whether the conditions authorizing annexation at all exist, such as contiguity, that lands are unplatted, that owners do not consent, etc. 2d. Whether, if all of those facts are found affirmatively, as a matter of public policy the annexation ought to be made. As to this second question the board exercises a legislative discretion. It may find affirmatively every fact under the first head, and then it may, and in many cases should, deny the annexation. To say otherwise is to hold that all unplatted lands contiguous to a city should be annexed against the will of the owners. This idea carried out results by successive annexations in annexing all the lands in a state to its cities. Because the board in the exercise of this discretion,

legislative in its character, said this annexation should not take place, the judgment of the circuit court, a purely judicial tribunal, saying that it should, was void. It was an attempt to exercise a power that was not, and could not be, vested in the court, and, therefore, it is idle to say its action can be upheld by presumptions.

Counsel say the Porter Circuit Court, as its first step, was compelled to ascertain and determine its own jurisdiction. So was the court in each of the cases referred to in Windsor's case, and in Walker's case, *supra*. The Porter Circuit Court was also at the same time required to ascertain the limits of its powers, and if it transcended those powers, it did so with the certainty that its judgment *pro tanto* would be treated as a nullity.

With the decisions, generally, cited in support of this second contention of the brief for petitioners, we have no dispute, although we are not prepared to admit, as counsel seems to assume is held in the Foltz case, 60 F. R. 316, that a decree for the condemnation of real estate, showing upon its face that the condemning party is a foreign corporation, which under the law has no capacity to condemn, is unassailable collaterally. It seems to us that to so hold is, by the force of mere presumptions, to give the courts, not merely the right to determine their own jurisdiction, but to make and unmake statutes and constitutional provisions. It is easy enough to assent to the proposition that, if the question whether the corporation was a foreign or domestic corporation was a fact in the case, to be determined by the trial court, and that determination was either expressly or impliedly to the effect that the corpor-

ation was domestic, the jurisdiction would be maintainable; but, as before stated, the fact of the corporation being foreign and therefore incapable of proceeding being shown and conceded upon the face of the record, it seems to us, presents a very different question, though we do not see that it is important here.

The trouble, as it seems to us, with the reasoning of counsel for the petitioners, and with his citation of authorities in support of his contention under this head, is that he confounds questions of fact, upon which a trial court is required to pass in order to determine its jurisdiction, with questions of law which are absolute and insurmountable limitations upon the power of the court to act at all.

With reference to the claas of cases in the federal courts cited, wherein it is held that a judgment between parties not having proper citizenship is not void collaterally, it is enough to say that they stand upon a peculiar footing and are *sui generis*. The citizenship question is not treated as going exclusively to either the question of parties or subject matter, and the cases, therefore, are not authority here. The key to the problem here to be solved is, however, furnished in the quotation on page 26 of the brief for appellees. from the opinion of Judge Putnam in Pullman's case, 66 F. R. 790, wherein he says:

> Except in extreme cases, *as where a judgment was beyond the scope of the powers of the court*, or no jurisdiction was obtained over the person, etc., * * * the decisions of the Supreme Court are numerous that it can not be attacked collaterally for mere errors.

In the case at bar, the prime contention is that, in the language of Judge Putnam, the judgment

was beyond the scope of the powers of the court, and if so, then, according to the decisions heretofore cited, the judgment was *pro tanto* void.

IV.

The third subdivision of the argument for petitioners seems to us to require little attention. There can not be a difference of opinion between lawyers as to the propositions maintained in the authorities cited under this head.

When a court of competent jurisdiction, having jurisdiction of the parties and of the subject matter, has made an adjudication, it is conclusive at all times and everywhere between the same parties. The infirmity of the argument for the petitioners in this subdivision is found on page 39 of their brief, where is thrown in a clause which, in the broad interpretation given it by counsel is misleading. It is said: "It will be seen from an examination of the cases that the decision of a competent tribunal relative to the subject matter of the litigation, *or any fundimental part thereof*, which was or could have been adjudicated between the parties, either in their individual or representative capacity, is a complete determination of litigation on that subject."

In other words, the proposition is that, if a court of general jurisdiction has jurisdiction to hear and determine any part of a subject matter of litigation and to make a decree or judgment in reference thereto, its action is necessarily conclusive as to the whole subject matter, if it chooses to attempt to exercise such jurisdiction.

With the utmost respect, we submit that this is directly at variance with the numerous decisions

of the Supreme Court of the United States, and of the State of Indiana, to which we have called attention.

Windsor's case, 93 U. S. 274;

United States v. *Walker*, 109 U. S. 258.

Jamieson v. *The Board*, 56 Ind, 466, and numerous other cases *supra*, in which it is held that the judgment or decree of a court of superior or general jurisdiction, having jurisdiction of the parties and subject matter, may be valid in so far as that jurisdiction goes, but is void so soon as the line of that jurisdiction, or of its powers in the premises, is transgressed.

We submit also that the last three or four lines of the quotation from *Foster* v. *Gibbons*, 14 C. C. A. 625, show clearly the inapplicability of that decision to the case at bar.

> The record in a suit for foreclosure of a mortgage need not show that the land mortgaged lies in the county. *In the absence of an averment to the contrary, this will be presumed until the contrary is shown.*

Suppose the contrary were shown? If the jurisdiction were by statute limited to lands in the county, and it appeared in the record that some of the lands were not in the county, what then?

On page 42 of the brief for Petitioner, in the discussion of this third subdivision, it is assumed that, because the circuit court is a court of general jurisdiction, having original, exclusive jurisdiction in all cases at law and in equity, therefore it must have the same general powers and be attended with all the same presumptions in special proceedings—a proposition which we have seen is untenable.

V.

In the fifth subdivision of the brief for petitioners (sub. IV to be referred to hereafter), it is contended that the court erred in holding that it is competent for the legislature of Indiana to vest legislative power in the Board of County Commissioners. As said in the brief of our associate, this contention is sufficiently met by the direct adjudication of the Supreme Court in the Stilz case, upon this very statute, that such legislative power has been delegated to the Board of Commissioners. Nor do we find any such difficulty in the Bearss case, 55 Ind. 576, as seems to impress counsel for the petitioners.

In a delegation of legislative power by the legislature it is entirely competent to provide the terms upon which such power shall be exercised. In other words, to provide that upon a given petition being filed, that tribunal may grant or refuse to grant the prayer of the petition in its entirety. It does not occur to us that, because the legislature thus limits the exercise of the delegated power, it is any proof that it is not a legislative or discretionary power. Undoubtedly the legislature might provide that the inferior tribunal might grant the prayer of the petition in whole or in part, but it is sufficient to say that it did not do so, and that is all the explanation necessary, as it seems to us, of the Bearss case.

Moreover, it would seem that this contention on the part of counsel for petitioners is *felo de se*. The annexation of territory is so clearly a legislative function that counsel in their brief scarcely attempt to controvert the court's position upon that question. It being, then, granted that the annexation of territory is a legislative function, and it being

assumed, as counsel contend, that that function can not be exercised by the Board of County Commissioners, it follows that this statute is entirely void, and neither the Board of County Commissioners nor the circuit court ever got jurisdiction. The County Commissioners, according to the argument of counsel, did not get jurisdiction because they could not exercise a legislative function, and surely it will not be contended that the circuit court got jurisdiction of a subject by appeal, of which the inferior tribunal got no jurisdiction whatever.

VI.

The sixth subdivision of brief for petitioners is a labored attempt to maintain the proposition that Article 3 of the Constitution of the State of Indiana, which reads as follows:

> The powers of the government are divided into three separate departments, the legislative, executive (including the administrative) and the judicial; and no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in this Constitution expressly provided.

has no practical significance. Numerous decisions of the federal courts are cited, upholding the exercise of quasi-judicial functions (quasi only) by officers of the executive department of the federal government, though the fact is not mentioned that the federal constitution, while recognizing the threefold division of governmental powers, contains no such peremptory provision as Article 3 of the Constitution of Indiana.

Of course, in considering these decisions, and all other decisions touching these questions, it is to be kept constantly in mind that the courts frequently

use the word "judicial" not in the technical sense, but with the broader, more popular signification of "the exercise of judgment".

Counsel also contend that the rule is deducible from the recent decisions of the Supreme Court of Indiana that the board, in the matter under consideration, exercised no discretion at all; that their action could be controlled by mandamus; that from beginning to end the commissioners sit as a judicial tribunal, and in support of this contention they say that the supreme court has in several instances stated that the reasons set forth in the petition were sufficient. In view of the repeated declaration of the supreme court that the sufficiency of the reason upon which the board shall act is purely a matter of discretion with the board, this contention seems to require little consideration. In the Kokomo case, 36 N. E. 847, it is said:

> It has been held by this court that as the statute does not prescribe the reasons which shall be sufficient, the question is necessarily left to the sound discretion of the authority passing upon the petition. *Catterlin* v. *City*, 87 Ind. 45. In that case, and in the case of *Ellston* v. *The Board*, 20 Ind. 222, petitions of the general character of that in the present case were held sufficient. If, as indicated, the sufficiency of the reasons is a question within the sound discretion of the authority to which they are addressed, we could not review the exercise of that discretion unless possibly we should find that it had been palpably abused.

It seems, therefore, too clear for contention that in the statement of the reasons in the petition, and much more in determining as to the sufficiency of the reasons as proven, in other words, in determining the general question whether the annexation ought to be made, the board exercises the same sort of a discretion as that exercised by the Legislature in the enactment of laws.

It is important in this connection to bear in mind that the question here at issue is not, primarily, as the argument for the petitioner seems to assume, whether the acts conferring powers upon and regulating the proceedings of boards of commissioners have always been in strict harmony with the requirements of Article 3 of the Constitution in relation to the distribution of powers. The truth is that it is exceedingly difficult to reconcile all the statutes and decisions touching this subject. Not a little of the action of the board of commissioners has been upon disputed territory, and it is perhaps impossible with accuracy to define the boundary of its functions in accordance with Article 3. It has at all times undoubtedly, with the sanction of the Supreme Court, exercised functions apparently appertaining to each of the three departments of the government, an exercise which upon principle it is exceedingly difficult to justify. But it is sufficient to say, that such exercise has gone on for nearly a half century, and it is probably now too late to challenge the action of this board which in many of its features is nondescript and incapable of classification. The question here, however, is not with reference to the power of the board of county commissioners to exercise judicial functions, but of the power of the circuit court to exercise legislative functions, and it is a mistake to say that, as to the courts proper, the imperative limitation to judicial functions in Article 3 has ever been modified or waived. On the contrary, whenever the question has arisen in the Supreme Court, the requirements of that Article have been most vigorously insisted upon, and the power of the courts to excercise any

function, except that which is strictly and in the technical sense judicial, has been denied.

Shoultz v. *McPheeters*, 79 Ind. 373.

As was said by Judge Zollars, in the case of *Robertson* v. *The State, ex rel.* Smith, 109 Ind., on page 141. "This court has steadily maintained the independence of the co-ordinate departments of the government, refusing to yield its jurisdiction, and refusing to exercise functions belonging to the legislative or executive departments."

Smith v. *Myers*, 109 Ind. 1;
Ex Parte Griffiths, 118 Ind. 83;
Hovey v. *State*, 127 Ind. 588;
Langenberg v. *Decker*, 131 Ind 471;
State v. *Hazvorth*, 122 Ind. 462.

VII.

We do not care to discuss the seventh proposition of petitioner's brief. It, of course, has no significance except upon the assumption that the judgment or decree of the Porter Circuit Court reversing the action and overruling the discretion of the Board of Commissioners, was judicial action properly exercised upon a special matter within the proper cognizance of the Porter Circuit Court, which we think has been clearly shown was not the case.

The contention of counsel for petitioners that Section 1 of Article 4 of the Constitution of the United States requires that full faith and credit shall be given to the judgment of the Porter Circuit Court in this matter, if logically carried out, would lead to startling results. If the courts of a State were to baldly and confessedly usurp the functions of the legislature, and, instead of merely interpreting and construing the laws, should attempt to

make statutes, according to the contention of counsel for the petitioners, this clause of the federal constitution would require full faith and credit to be given to such pretended adjudications as judicial acts. In order to successfully invoke this constitutional provision in favor of the proceedings of any court, it must be made to appear that such proceedings were in accordance with the rules of law which are fundamental in our system of government. It will be observed that this section of the constitution applies, not merely to judicial proceedings but to public acts and records. Will it be contended that, if the legislature of one State were baldly to attempt to exercise judicial functions, in direct violation of constitutional provisions, that, by reason of this provision of the general compact, the authorities of all the other States would be bound by such usurpation? It seems to us that this contention does not require further discussion.

VIII.

We have not deemed it worth while to discuss at length the authorities cited and relied upon by counsel for petitioner for three reasons.

1st. One general comment distinguishes all or nearly all of them from the case at bar, viz.: They are cases in which there was conceded jurisdiction of the subject matter—the very question in dispute here.

2d. Many of these cases are reviewed in the brief of our associate filed in opposition to this petition.

3d. They will be examined and discriminated by the court.

With reference to the line of argument of the

counsel for petitioners in the fourth subdivision of their brief, we beg leave, however to make one or two suggestions in addition to those in Mr. Merrifield's brief.

It is most earnestly and ably insisted in petitioners' brief that the question at issue in the case being a construction of the Constitution of Indiana, is a question of local law, and that, by reason of the decision of the Supreme Court of Indiana, the Circuit Court of Appeals was imperatively required to hold this pretended annexation valid.

Enforcing this view, counsel for petitioner cite and make copious extracts from numerous decisions of the Supreme and other courts, in asserted opposition to the doctrine laid down in *Burgess* v. *Seligman*, 107 U. S. 20, and followed by the Circuit Court of Appeals. Without an elaborate discussion of those authorities, it is enough for us to say that in none of them is the rule of *Burgess* v. *Seligman* criticized or modified, nor do any of them meet the fact that the decision in this case was made before any decision upon the particular point involved was made by the Supreme Court of Indiana. This Court found the question unsettled, made its decision, and, upon well-settled principles, was under no obligation to change its rule to conform to a decision of the Supreme Court of Indiana subsequently made, especially where, as in the case at bar, the decision of the last named court was at variance with the fundamental principles of government. Judge Wood's opinion distinctly shows that the decision of the Circuit Court of Appeals was made before that of the Supreme Court of Indiana on this question.

It is true that in the opinion of the Circuit Court of Appeals the question here at issue was treated as one of local, rather than general jurisprudence, but, in view of the attack made upon this decision, we wish to invite the attention of the Court to that question.

We attempted to maintain upon the original argument, that, while the question at issue does in a sense involve the construction of the Constitution of the State of Indiana, yet it is not a question of local law; that it is as clearly a question of general jurisprudence as is the question of what constitutes taxation for a private purpose, which, in the case of *Olcott* v. *The Supervisors*, 16 Wall. 678, was held to be a question, not of local, but of general jurisprudence.

The division of the powers of government into three departments is not peculiar to the State of Indiana. It is a part of the federal constitution, and of the constitution of each one of the forty-five states of the Union. Nay more, it is a part of the system of each one of the territories. It is submitted that it is an essential feature of our republican form of government, sanctioned by unbroken usage for a century. It is true that in some of the States the same body by express provision, has been authorized to exercise both legislative and judicial functions; and sometimes, as in the federal government, the Senate, one of the branches of the legislative department, participates in some executive functions, as the executive, in the federal government, as well as in the State governments by the approval or disapproval of legislative acts, participates in the making of the laws. But all these are exceptional,

and the result of express constitutional provisions. They in no way militate against the proposition that the functions are in their nature essentially distinct, and they are the same always and everywhere.

The distinction between the three functions, legislative, executive and judicial, is not the result of local constitutions but antedates constitutions, and like the Common law is a part of the governmental atmosphere of the entire country. Indeed it is a part of the Common law and it seems very strange that the Federal Courts are independent of local decisions as to matters of general commercial law, but as to the rules of governmental action as wide as our domain, this court is subject to the control of local tribunals.

It is believed that no territory could be admitted as a State in the federal union which did not come to the doors of Congress with an organic law substantially maintaining this division of governmental powers.

It is idle, as it seems to us, therefore, to contend that the definition of legislative, executive and judidial functions is a question of local law. It is a question of law as broad and general as the sovereignty of this government, and ought to be decided upon principles equally broad. Indeed, it seems to us that Section 21 of Article 4 of the federal constitution adds force to this argument:

> The United States shall guarantee to every state in this union a republican form of government.

If such a division of governmental powers is a *sine qua non* to admission into the union, as we believe that it is, it would seem that it can only be

upon the ground that such division is believed to be an essential of our republican form of government.

We do not believe that any member of this Court, or any one of the counsel representing the petitioners, as a member of Congress, would vote for the admission of a State whose organic law did not provide for this substantial separation of governmental powers.

To hold that the definition of what constitutes a legislative, an executive, or a judicial power is to be, or may be, different, according to the various decisions of each of the forty-five States of the Union, and that the definition may still be different from all of them in the federal courts, is, as it seems to us, to assert that our system of government is bottomed upon no fixed principles whatever.

It is no argument against our contention that, as heretofore admitted, in some cases the president and governor exercise legislative powers, and the Senate sometimes exercises executive functions, or even sits, as it formerly did in New York, as a court of errors. This does not at all change the proposition that the powers themselves are essentially distinct and independent, and that this distinction is uniform in this country, making it a question of general jurisprudence. That being so, the provision of the Constitution of Indiana, which we have shown is in its terms not only positive, but has been held over and over again by the Supreme Court to be mandatory, requiring that one department shall not exercise any functions pertaining to the other, becomes the imperative law of this case, and requires the affirmance of the decision already

made by the Circuit Court of Appeals, if this Court shall entertain jurisdiction in the premises.

Respectfully submitted,

W. H. H. MILLER,
F. WINTER and
JOHN B. ELAM,
Of Counsel for Appellant.

164-706

Supreme Court of the United States.

OCTOBER TERM, A. D. 1896.

No. 615.

IN THE MATTER OF THE APPLICATION OF THE CITY OF HAMMOND FOR A WRIT OF CERTIORARI

IN THE CASE OF

CAROLINE M. FORSYTH,
Appellant,

VS.

THE CITY OF HAMMOND AND WILLIAM KLEIHEGE,
TREASURER OF THE CITY OF HAMMOND,
Appellees.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MOTION TO ADVANCE CAUSE.

CHARLES H. ALDRICH,
FRANK F. REED,
E. D. CRUMPACKER,
Solicitors for City of Hammond.

Eastman Bros., Law Printers, 352 Dearborn St., Chicago.

Supreme Court of the United States.

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No. 615.

CAROLINE M. FORSYTH,
Appellant,

vs.

THE CITY OF HAMMOND AND WILLIAM KLEIHEGE,
TREASURER OF THE CITY OF HAMMOND,
Appellees.

MOTION TO ADVANCE.

Now come the City of Hammond and William Kleihege, Treasurer thereof, and represent to the court that in the administration of the affairs of the said City of Hammond it is necessary that it be determined at the earliest possible date whether or not the six hundred and fifty (650) acres of land belonging to the said Caroline M. Forsyth, and embraced in the annexation proceedings, the validity of which was in issue in said cause, are actually a part of said city or not; that as heretofore set out in the petition filed herein, and shown by the proceedings in the several courts made a part thereof, the said six hundred and fifty (650) acres are part of an entire tract of twenty-eight hundred (2,800) acres annexed under the proceedings of the city council, and by the decisions of the courts of Indiana, and which annexation was held void by the decision of the United States Circuit Court of Appeals, Seventh Circuit; that said city has extended, and is proposing to extend, its jurisdiction over the

said tract so annexed, both by assessing the same for taxation, and extending drains, water-pipes and sewers, and providing for police protection, etc.; and that in order that such taxation may be uniform, and also the cost of such improvements may be properly adjusted, and not an undue proportion thereof fall upon the said twenty-one hundred and fifty (2,150) acres, and in order that pipes may be laid across this land for water, sewer and other purposes, and the general municipal improvements necessary for the health and convenience of its citizens carried forward, it is important that the questions involved be determined at an early date.

Your petitioners also show that other owners of portions of the property embraced within the said twenty-one hundred and fifty (2,150) acres, encouraged by the decision of the Circuit Court of Appeals aforesaid, although unable by reason of the amounts involved, or their citizenship, to appeal to the federal jurisdiction, refuse to pay the taxes assessed against their several tracts of land, and in this way embarrass the city in the administration of its affairs.

Your petitioners therefore state that they are advised and believe that the issues are of such a character, and the importance of an early decision so manifest, that an emergency exists which justifies this court in advancing such cause and setting the same down for an early hearing.

And your petitioners therefore pray that the said cause may be advanced and set down for an early hearing at the present term of this court.

CHARLES H. ALDRICH,
Solicitor for Petitioners.

FRANK F. REED,
E. D. CRUMPACKER,
Of Counsel.

STATE OF ILLINOIS, } ss.
COOK COUNTY. }

I, Fred R. Mott, on oath say that I have read the above and foregoing petition to advance the above-entitled cause and set the same down for an early hearing, and know the contents thereof, and that the same is true in substance and in fact; that I am the Mayor of said City of Hammond, and as such am acquainted with the needs and purposes of said city as therein set forth, and the necessity of an early hearing of said cause to avoid great confusion and loss in the affairs of said city. And further affiant saith not.

FRED R. MOTT.

Subscribed and sworn to before me, a Notary Public in and for said county and state, this 30th day of October, A. D. 1896.

WARREN A. DRAKE,
Notary Public.

164-706

Office Supreme Court, U. S.
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CLERK

164-706

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

CAROLINE M. FORSYTH,
vs.
THE CITY OF HAMMOND, *et al.*, } No. 615.

MOTION TO DISMISS
AND
BRIEF ON THAT MOTION AND ON MERITS.

W. H. H. MILLER, and
JOHN B. ELAM,
Solicitors for Caroline M. Forsyth.

ENGLE PRINT, 16 N. DEL., INDPLS.

Supreme Court of the United States.

OCTOBER TERM, 1896.

CAROLINE M. FORSYTH,
vs.
THE CITY OF HAMMOND, *et al.*, } No. 615.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The said Caroline M. Forsyth moves the Court to dismiss this case from its docket for the reason that the decree of the Circuit Court of Appeals rendered in said case was not a final decree, nor is there any final decree in force or existing in said suit.

W. H. H. MILLER, and
JOHN B. ELAM,
Solicitors for Caroline M. Forsyth.

Supreme Court of the United States.

OCTOBER TERM, 1896.

CAROLINE M. FORSYTH,
vs.
THE CITY OF HAMMOND, *et al.*, } No. 615.

BRIEF ON MOTION TO DISMISS AND ADDITIONAL BRIEF ON MERITS.

At the beginning of our original brief in opposition to the Petition for a Writ of Certiorari, we made the point that the writ should not be granted because the decree of the Circuit Court of Appeals was not final.

We now repeat that objection in this motion to dismiss.

As no opinion was filed in connection with the order granting the writ, we have no means of knowing what attention this question received.

We did not see then, and we do not now see, how, consistently with its decisions, this Court can entertain jurisdiction of this case.

The cases of the *Northwestern R. R. Co. v. Junod*, and *same* v. *Osborne*, 146 U. S. 354, seem to us to be directly in point, and decisive.

In each of these cases an action at law had been prosecuted in the Circuit Court resulting in a final

judgment against the railroad company, the defendant, for damages caused to plaintiff by reason of defendant's violations of the Interstate Commerce Act. In each case, upon writ of error, the Circuit Court of Appeals reversed the judgment of the trial court and remanded the case to that court "for further proceedings in accordance with its opinion." Application being made to this Court by the plaintiffs in the original actions for writs of certiorari, that writ was denied. That this denial was upon the ground that there was no final judgment in the case is perfectly clear, because to the conclusion reached three decisions only were cited, and in each that was the turning point of the decision.

McLish v. *Roff*, 141 U. S. 661,
Rice v. *Sanger*, 144 U. S. 197,
Meagher v. *Minnesota Thresher Mfg. Co.*, 145 U. S. 608.

In each of those cases this Court refused to take cognizance of the matter because there was no final decree or judgment.

Nor do the decisions of this Court on this point stop there.

In *Union Mutual Life Ins. Co.* v. *Kirchoff*, 160 U. S. 374, the facts were that the circuit court of Cook County, Illinois, dismissed a bill in chancery for want of equity. On appeal to the appellate Court the decree of the Circuit Court was reversed "with directions to enter a decree in compliance with the opinion of the Appellate Court."

From the decree of the Appellate Court the Insurance Company prosecuted an appeal to the Supreme Court of the State which affirmed the decree of the Appellate Court. To reverse that

decision the writ of error from this Court was sued out. Mr. Justice Brown, speaking for this Court, says:

> Obviously the decree, to review which this writ of error was sued out, was not a final decree. The finality of decrees is a subject which has been so much discussed in the decisions of this court that it is useless to do more than to cite the cases of *Lodge* v. *Twell*, 135 U. S. 232, and *McGourkey* v. *Toledo & Ohio Central Railway*, 146 U. S. 536, wherein most of the prior cases are reviewed.
>
> This case is not one for nice distinctions, since the rule is well nigh universal that, if the case be remanded by the appellate court to the court below for further judicial proceedings, in conformity with the opinion of the appellate court, the decree is not final. Especially is this the case when the opinion, to which the new decree is required to conform, does not appear.
>
> *Brown* v. *Baxter*, 146 U. S. 619;
> *Houston* v. *Moore*, 3 Wheat. 433;
> *Bostwick* v. *Brinkerhoff*, 106 U. S. 3;
> *Johnson* v. *Keith*, 117 U. S. 199;
> *Rice* v. *Sanger*, 144 U. S. 197;
> *Meagher* v. *Minnesota Thresher Mfg. Co.*, 145 U. S. 608
> *Hume* v. *Bowie*, 148 U. S. 245;
> *Werner* v. *Charleston*, 151 U. S. 360.
>
> The writ of error, is therefore,
>
> Dismissed.

The same rule is enforced in *Hollander* v. *Fechheimer*, 162 U. S. 326.

Apply this doctrine to the case at bar. The decree of the Circuit Court of Appeals reads,

> On consideration whereof it is now here ordered, adjudged and decreed, by this Court, that the decree of the said circuit court refusing a temporary restraining order in this cause be and the same is hereby reversed, with costs, and that this cause be, and the same is hereby remanded to the said Circuit Court with directions to take such further proceedings as are not inconsistent with the opinion of this Court.

If this be a final decree, it seems to us the decisions cited are at fault; if it be not a final decree,

then under those decisions the motion to dismiss must, it seems to us, be sustained.

The fact that it comes to this Court by certiorari instead of upon appeal is shown to be immaterial by the decision in the Junod and Osborne cases, and that an order that a case be remanded for proceedings "not inconsistent" is not final seems too clear for argument. The case stands so far as any decree is concerned exactly where it stood before the Circuit Court acted at all. *Non constat* that a final decree would ever be entered for complainant. The bill may be amended. An answer may be filed. The bill might not be proven. Defendants might plead and prove a defense. Unless, therefore, this Court can say that on receiving the Mandate of the Circuit Court of Appeals the Circuit Court would have been bound to have entered a final decree for complainant, notwithstanding application to file answer was made and answer tendered, it is not seen what this Court has in the way of a decree to review. In short unless this Court can take cognizance of and decide a case immediately after bill filed and before any decree at all is entered, it is not seen how it can entertain jurisdiction in this matter.

II.

A few words further on the merits:

As shown in our briefs in opposition to the granting of the writ of Certiorari, the opinion of Judge Howard of the State Supreme Court in this case concedes that the annexation of territory is a legislative function,

142 Ind. p. 516.

He also admits what of course can not be denied under the constitution of the State, Art. 3, Sec. 1, that the Courts can not exercise this legislative function. But he says that the Common Council exercises this legislative function when it resolves to annex certain lands, and to present a petition therefor to the County Board.

"The petition" says the Judge "must give the reasons, why, in the opinion of the Council, the annexation should take place. The sufficiency of such reasons, and whether they in fact exist, calls for the decision of the tribunal appointed to hear the petition". . . . Whether the reasons given in the petition are true and are sufficient seem to be questions calling for judicial examination". Let us consider this for a moment. Here is a legislative discretion. The judge says this discretion is exercised by the Council, and that then the reasons inducing the exercise of this legislative discretion are to be reviewed, first, by the Board of Commissioners, and second, by a court and jury.

Now if there is a legislative discretion to be exercised in annexing or refusing to annex, as Judge Howard admits, does not this discretion cover the reasons for the annexation? And how is it competent for the courts to review that discretion at all?

We have here a legislative question, first resolved one way by the council, second decided the other way by the Board of Commissioners and finally the latter action reversed and the question decided the other way by the court and jury.

If the sufficiency of the reasons for the annexation were legislative when they started in the council, when did they become judicial? What were

they when pending before the Board? Does the same question change from legislative to judicial by reason of its passing from one tribunal to another? Of course the distinction between the *reasons* for annexation and the *conditions* of annexation must be kept in mind. The former are, or at least include, matters of judgment, opinion, discretion. The latter are matters of fact to be settled by evidence. The existence of the latter may well be referred to the courts, as for instance, contiguity. But the policy, the legislative reasons are not, and can not be judicial questions.

To say that the question is legislative and that the council exercises a legislative function in determining it, but that the courts can review such legislative action is simply a contradiction in terms,—not to say a legal absurdity.

It would be just as logical and just as sensible to say, that, before any act of the legislature shall be valid, the wisdom, the policy, or, in the language of Judge Howard, "the reasons" for such legislation shall be submitted to a court and jury.

III.

But Judge Howard is mistaken in another particular.

The legislature never intended that the Common Council should decide this question.

An examination of the Statutes (Secs. 3195—3197 R. S. 1881) shows indisputably that it is only when the property owner consents that the council can decide.

1. It can annex platted lots because a platting

of lands adjoining a city or town is taken as consent to annexation.

2. When lands are unplatted, if the owner consents, the council may, by a two thirds vote, decide the question and annex:

3. If the owner does not consent the council can present a petition to the Board of Commissioners, etc.

This can be done by an ordinary majority vote of the council.

Is it not marvelous, if, when the owner consents, the council can exercise this legislative power only by a two thirds vote, but when the owner does not consent, the legislative power can be exercised by a mere majority?

It is submitted that this position of Judge Howard is wholly untenable. The legislature in such case attempted to provide for an adversary proceeding, and did not intend that in such adversary proceeding one of the parties should be at the same time a litigant and a judge in its own case,—a violation of the first principles of all jurisprudence,—and not due process of law.

IV.

1. On page 12 of our smaller brief filed in this Court in opposition to the petition for certiorari, in speaking of Judge Baker's opinion, which rests largely upon the assumption that a municipal corporation under the Constitution of Indiana can only be created by general law, we stated that we thought that contention was erroneous, although apparently supported by a decision of the Supreme Court there cited. We now call the attention of the Court to the latest expression of the Supreme

Court of Indiana upon that subject, the case of *Mode* v. *Beasley*, 143 Ind. 306, the last volume of our published reports, which fully confirms our position in that matter.

On pages 312, and 313, discussing the attempts of the legislature to cover up special legislation by a pretense of making the legislation general by classification, attention is called to the charter of the City of Indianapolis of 1891, and it is declared that, while that charter is undoubtedly special legislation, it is nevertheless valid. Thus on the bottom of page 312, it is said:

"Hence the legislative intent is made clear and undoubted, that the act was designed never to have any effect or operation anywhere in the State outside the City of Indianapolis, while it purports to be a general act; and yet no one can entertain a reasonable doubt of the constitutionality of the act, not because it purports to be general, but because it is on a subject on which the applicability of the general law has been left by the Constitution to the exclusive judgment of the legislature on inquiry into the facts." It is true that no reference is made in this decision to Article XI of the Constitution, but in view of the fact, as shown in our former brief, that every section of that article manifestly refers only to monied private corporations, its inapplicability to a municipal corporation can not be doubted, nor can it be doubted that the Supreme Court would now so hold.

In view of these conflicting decisions, therefore, it is idle to say that there is any settled rule of judicial decision to the contrary in this State.

If it be said that the declaration in *Mode* v. *Beasley* on this subject was in argument only by the Court, the answer is that the same is true in the corporation of *Bluffton* v. *Studebaker*, 106 Ind. 129. The statement in that opinion that under the present constitution a municipal corporation can only be created by general law was wholly unnecessary to the decision of the case. The matter stands then upon the two *dicta*, and that of *Mode* v. *Beasley* has the advantage in two particulars. First, in that it is founded upon the better reason; and, second, that it is the later declaration of the Supreme Court.

Besides, as shown in our other brief, this is not incorporation but annexation.

2. In our larger brief at page 33, attention was called to the very recent, then unreported, decision of the Supreme Court of Wisconsin, *In re* Village of North Milwaukee. This case is reported in 67 N. W. at page 1033, where the precise question here under consideration was fully and thoroughly discussed, and it was held that the annexation of territory is a legislative function, and that an attempt to delegate the exercise of that function to the Courts was invalid. Of course, as stated in our other brief, we do not contend that it is not competent for the legislature to delegate to the courts the ascertainment of facts upon the existence of which the law will take hold of the subject matter and declare the result. What we do contend for, and what the decisions we rely upon maintain, is that the legislature has delegated to the Board of County Commissioners a legislative discretion in the matter, and they in the exercise of that discretion having decided

against annexation, it is not in the power of any court reviewing their action to overrule that decision. If the Board of Commissioners had decided in favor of the annexation, it might well be the court might judicially examine and ascertain that some of the conditions essential to annexation did not exist, as for instance, contiguity, etc., and in that event might prevent the annexation. Such action could be had without reviewing the legislative discretion. But when the board has decided against the annexation, it is not possible for the Court to overrule that decision and order the annexation without exercising the legislative discretion.

W. H. H. MILLER.
JOHN B. ELAM.
Solicitors for Caroline M. Forsyth.
BENJ. HARRISON,
Counsel.

NOV 2 1896

164-706

Supreme Court of the United States.

OCTOBER TERM, A. D. 1896.

No. 615.

IN THE MATTER OF THE APPLICATION OF THE CITY OF HAMMOND FOR A WRIT OF CERTIORARI

IN THE CASE OF

CAROLINE M. FORSYTH,
Appellant,

VS.

THE CITY OF HAMMOND AND WILLIAM KLEIHEGE,
TREASURER OF THE CITY OF HAMMOND,
Appellees.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

ADDITIONAL BRIEF IN BEHALF OF THE CITY OF HAMMOND.

CHARLES H. ALDRICH,
FRANK F. REED,
E. D. CRUMPACKER,
Solicitors for City of Hammond.

Eastman Bros., Law Printers, 358 Dearborn St., Chicago.

IN THE

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IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

A grave error of fact, found in both briefs filed in behalf of Caroline M. Forsyth, leads us to file this addition to our former brief filed in support of the petition for *certiorari*. With this addition we are content to submit the cause upon the argument already made. Mr. Miller states (p. 43, his brief):

> "Without an elaborate discussion of these authorities, it is enough for us to say that in none of them is the rule of *Burgess* v. *Seligman* criticized or modified, nor do any of them meet the fact that the decision in this case was made before any decision upon the particular point involved was made by the

Supreme Court of Indiana. This court found the question unsettled, made its decision, and, upon well-settled principles, was under no obligation to change its rule to conform to a decision of the Supreme Court of Indiana subsequently made, especially where, as in the case at bar, the decision of the last-named court was at variance with the fundamental principles of government. Judge Woods' opinion distinctly shows that the decision of the Circuit Court of Appeals was made before that of the Supreme Court of Indiana on this question."

Mr. Merrifield states (p. 30, his brief):

> "The principal question here involved was first raised in the Federal Circuit Court. It was not raised in the Supreme Court of Indiana until after the bill in this case was filed, and the question was not decided by that court until the decision of the Circuit Court of Appeals in this case had been in fact made."

And this is subsequently repeated in other places in these briefs.

The opinion of the Circuit Court of Appeals bears date January 16, 1896 (71 Fed R., 443), and in this opinion the action of the Supreme Court of the State of Indiana upon the motion of Mrs. Forsyth for a rehearing is fully discussed. (71 Fed. R., 453.)

This action of the Supreme Court, establishing the law in the State of Indiana, was taken on November 7, 1895. (41 N. E. Rep., 950.)

The mistake of counsel doubtless arises from the following language found in the opinion of the Circuit Court of Appeals (71 Fed. R., 453):

> "The hearing upon this appeal had been had before the decision upon the petition for a rehearing in the state court was rendered, and before we had knowledge of it we had in consultation agreed upon the opposite view. That decision—in which, for the

> first time, the court has recognized the right of appeal to the Circuit Court from a decision of a county board refusing to order an annexation of territory to a city—it is clear, was the result largely of a misapprehension of the Grusenmeyer case and in part of the decision below in this case, which itself is due partly to the same misapprehension and partly to the supposed effect of the constitutional inhibition against special legislation—a matter which we do not regard as of controlling significance. Under the circumstances, are we required to yield our judgment to the authority of that ruling?"

This statement is as to the *date of knowledge* by the court of the Indiana decision, not as to the *date of action*.

There are facts in the record which make the suggestion of counsel improbable to the last degree.

The case was argued October 30, 1895, and on that date the following order was entered:

> "It is ordered by the court that the appellee be and is hereby allowed fifteen days from this date in which to file brief in this cause." (Record, 34.)

And on November 16, 1895 (Record, 35), the following order was entered:

> "It is ordered by the court that the time allowed appellee in which to file his brief in this cause be and the same is hereby extended three days."

It is hardly to be supposed that the court was accepting briefs and extending the time therefor after it had decided the case; at least it is thought that courts do not ordinarily decide cases before they have been briefed by counsel or engage in any such play as counsel's statement would imply. Either the original date granted the then counsel for the City of Hammond, or the extended date, brings the time long after the date of the opinion upon the petition for rehearing (November 7, 1895). If the court had reached its conclusion before receiving briefs of

counsel, it might serve to account for the character of the decision, but we are unable to indulge even this presumption in favor of the court, and the counsel are plainly in error in the statements quoted.

Again, a mere decision or conclusion, reached as a mental operation and apart from expression in opinion, may be potent as affecting the probable or prospective rights of litigants, but has no effect as law until made a matter of record; and as such the Circuit Court of Appeals can only speak from January 16, 1896.

At this time, and from November 7th, 1895, as between these same parties upon this identical issue, after the most painstaking investigation, in which as able counsel as could have been selected from the bar participated, the law of the State of Indiana and the proper construction of the constitution of the State of Indiana had been settled by the highest court of that State.

To place against this authoritative declaration the impressions, or, as counsel would call them, the conclusions, of the judges of the Federal Court, formed without the benefit of briefs by counsel for the City of Hammond, is, or ought to be, unavailing. The opinion of the Supreme Court of Indiana was in line with many other decisions by that court and in conflict with none. The opinion of the Circuit Court of Appeals does violence to all these, affords relief to a litigant who has had her day in court, and refuses to the judicial tribunals of Indiana the right to finally construe the statutes and constitution of that State in a matter purely local in character and in which the federal government can have no possible concern.

The writer of this brief, though entertaining the highest respect for the members of the court below, would feel himself derelict to his duty as counsel in this case and

as a citizen if he hesitated to call attention to the fact that such an opinion is "revolutionary and dangerous in all its tendencies" and subversive of the fundamental principles of our government.

Respectfully submitted,

CHARLES H. ALDRICH,
Solicitor for the City of Hammond.

FRANK F. REED,
E. D. CRUMPACKER,
Of Counsel.

164-706

Office Supreme Court, U. S.
FILED.
MAR 15 1897
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CLERK.

164-706

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 615.

CAROLINE M. FORSYTH, APPELLANT,

vs.

THE CITY OF HAMMOND ET AL.

SUGGESTION AS TO INDIANA LEGISLATIVE RECORD SINCE ARGUMENT OF CASE.

CHARLES H. ALDRICH,
FRANK F. REED,
E. W. CRUMPACKER,
Solicitors for the City of Hammond.

(16,394)

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 615.

CAROLINE M. FORSYTH, APPELLANT,

vs.

THE CITY OF HAMMOND ET AL.

SUGGESTION AS TO INDIANA LEGISLATIVE RECORD SINCE ARGUMENT OF CASE.

Since the argument of the above-entitled cause the landowners who had litigated the validity of the annexation proceedings and all questions relating thereto arising under the statutes and constitution of the State of Indiana and had been defeated by the decision of the supreme court of that State have sought relief at the hands of the legislature of the State of Indiana.

As shown by the accompanying record, the legislature, which has now adjourned, refused to enact a bill designed to *disannex* the lands in controversy, thus in effect confirming the action of the executive and judicial departments of the State government.

It has seemed just to our client that this fact should be

brought to the attention of the Court without comment. We therefore submit a certified copy of the proceedings upon this bill under the seal of the secretary of the State of Indiana.

CHARLES H. ALDRICH,
FRANK F. REED,
E. W. CRUMPACKER,
Solicitors for the City of Hammond.

Certificate.

STATE OF INDIANA, } ss:
Office of the Secretary of State, }

I, William D. Owen, secretary of state of the State of Indiana, do hereby certify that the attached papers contain a full, true, and complete copy of House bill No. 475 and a full, true, and complete copy of Senate bill No. 440, each being a bill for an act to disannex certain lands and territory from the city of Hammond, Indiana, and declaring an emergency; also a full, true, and complete transcript of the records of both House and Senate Journals of the sixtieth session of Indiana General Assembly relating to the above-described bills.

In witness whereof I have hereunto set my hand and affixed the seal of the State of Indiana, at the city of Indianapolis, this 9th day of March, A. D. 1897.

[SEAL.] WILLIAM D. OWEN,
Secretary of State

Transcript of the record, as shown by the House Journal of the Sixtieth General Assembly of the State of Indiana, of the action taken by the House on House bill No. 475.

Said Journal of February 3, 1897, relative to said bill contains the following:

Mr. Linck introduced House bill No. 475, entitled "A bill for an act entitled An act to disannex certain lands and

territory from the city of Hammond and declaring an emergency;" which was read a first time and referred to the committee on the judiciary.

Relative to said House bill No. 475, the House Journal of February 4, 1897, shows the following:

Mr. Linck, from the committee on the judiciary, submitted the following report:

Mr. Speaker, your committee on the judiciary, to whom was referred House bill No. 475, entitled "A bill for an act entitled An act to disannex certain lands and territory from the city of Hammond and declaring an emergency," have had the same under consideration and beg leave to report the same back to the House with the recommendation that said bill do pass.

Which report was concurred in.

The House Journal of February 25, 1897, relative to said bill contains the following record:

House bill No. 475, entitled "A bill for an act entitled An act to disannex certain lands and territory from the city of Hammond and declaring an emergency."

Which was read a second time and the bill was ordered to be engrossed.

The House Journal of March 1, 1897, relative to said House bill 475 contains the following:

"Engrossed House bill No. 475, entitled 'A bill for an act entitled An act to disannex certain lands and territory from the city of Hammond and declaring an emergency.'"

Which was read a third time.

The question being, shall the bill pass?

Mr. Hedgcock moved to strike out the enacting clause, and on that motion Messrs. O'Bannon and Hedgcock demanded the ayes and noes.

Those voting in the affirmative were:

Messrs. Archibald, Bowers, Brown, Canada, Clauser, Claycomb, Cockrum, Downey, East, Engle, Eichhorn, Elliott of Henry, Elliott of Marion, Feist, Furness, Geisel, Graham,

Harfley, Hall, Harris, Henderson, Herod, Hicks, James, Kayser, Kell, Kelly, Littleton, Mann, Marsh, Miller, O'Bannon, Packard, Purvis, Randolph, Record, Rhoades, Rifenburg, Ross, Schaal, Schoonover, Sence, Smith of Allen, Smith of Tippecanoe, Stetler, Sutton, Swope, Thomas, Titus, Wair, Wallrath, Willoughby, and Wise. Total, 53.

Those voting in the negative were:

Messrs. Barlow, Blankenship, Butler, Elliott of Washington, Fornshell, Gibson, Goddard, Hubbard, Jernegan, Jones, Knepper, Kratz, Lambert, Linck, McCart, McCrea, Medsker, Monyhan, Morgan, Morris, Newton, Nicholson, Patterson of Fulton, Peckinpaugh, Remington, Reynolds, Roose, Roots, Schrader, Shideler, Spooner, Williams, and Woodruff. Total, 33.

So the motion by Mr. Hedgcock to strike out the enacting clause prevailed.

I hereby certify that the foregoing is a correct transcript of that part of the Journal of the House of Representatives of the Sixtieth General Assembly of the State of Indiana as it relates to House bill No. 475, a true copy of which is hereunto attached and marked Exhibit "A."

Witness my signature this 9th day of March, 1897.

J. O. LAMBERT,
Assistant Clerk of the House of Representatives.

EXHIBIT "A."

House Bill No. 475.

A bill for an act to disannex certain lands and territory from the city of Hammond, and declaring an emergency.

Whereas, the city of Hammond filed and presented its petition to the board of commissioners of Lake county at the June session thereof, for the year 1893, for the annexation of certain lands and territory described as follows, to

wit: "Beginning at a point on the Indiana and Illinois State line, which point is the southwest corner of section number thirteen (13) in township thirty-seven (37) north, range ten (10) west of the second (2d) principal meridian; thence running easterly along the south line of said section thirteen (13) and along the south line of section eighteen (18) in township thirty-seven (37) north, range nine (9) west of the second (2d) principal meridian to the southeast corner of said section eighteen (18); thence running northerly along the east line of said section eighteen (18) and along the east line of section seven (7) in same township and range, to the northeast corner of the southeast quarter of said section seven (7); thence running westerly along the north line of the southeast quarter of said section seven (7) to the northwest corner of said southeast quarter of said section seven (7); thence running northerly along the east line of the northwest quarter of said section seven (7) and along the east line of the west half of section six (6) in township thirty-seven (37) north, range nine (9) west of the second principal meridian to the intersection of said line with the meander line of the south shore of Lake Michigan; thence running northwesterly along the meanderings of the south shore of said lake to the intersection of said meander line with the Indiana and Illinois State line; thence running southerly along said State line to the place of beginning." And said board of commissioners decided against said petition and said city appealed from said decision and eventually procured such proceeding to be transferred to the Porter circuit court, where the December term of said court for the year 1893, there was a trial of the same, resulting in a decree of said court, that said lands and territory be annexed to the said city of Hammond, and whereas such annexation of said lands to said city was wholly unnecessary for any municipal or legitimate purpose whatever, and imposed heavy and unreasonable burdens upon the property-owners and tax-payers of said territory, without their

consent and without the possibility of their being remunerated for the same or benefited in any manner whatever; and whereas, such annexation was made without the consent of said board of commissioners, but against their consent and judgment; and whereas, the said city of Hammond had under its jurisdiction, before said annexation, territory to the extent of about eight (8) square miles; and whereas, the territory so annexed consisted of about five (5) additional square miles, no part of which was in contiguity with any inhabited part of said city, but was distant from the same at least one mile; and whereas, the inhabitants of said annexed territory had and have no need whatever of municipal government, said territory being used almost exclusively for grazing and agricultural purposes, and being very thinly and sparsely settled, and no part of it having been laid out into lots with reference to the city of Hammond; now, therefore

SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, That such lands and territory be and the same are hereby disannexed from said city and declared to be wholly exempt and free from jurisdiction of said city, in all respects whatever, the same as if said annexation had not been made.

SEC. 2. It is further declared that an emergency exists for the immediate taking effect of this act; the same therefore shall take effect and be in force from and after its passage.

Mr. Speaker, your committee on judiciary, to which was referred House bill No. 475, introduced by Mr. Linck, has had the same under consideration, and begs leave to report the same back to the House with the recommendation that said bill do pass.

LINCK, *Chairman.*

[Endorsed:] House bill No. 475. A bill for an act to disannex certain lands and territory from the city of Ham-

mond, and declaring an emergency. Linck. February 3, 1897, read first time and referred to committee on judiciary. February 4, 1897, reported favorably.

Transcript of the record, as shown by the Senate Journal of the Sixtieth General Assembly of the State of Indiana, of the action taken by the Senate on Senate bill No. 440.

Said Journal of February 18, 1897, relative to said bill contains the following:

Senator Hubbell introduced Senate bill No. 440, entitled "A bill for an act to disannex certain lands and territory from the city of Hammond and declaring an emergency."

Read a first time and referred to the committee on judiciary.

The following further record of said bill in the Journal of March 3, 1897, is as follows:

"The committee on judiciary made the following reports:

Mr. President, a majority of your committee on judiciary, to whom was referred Senate bill No. 440, introduced by Senator Hubbell, has had the same under consideration, and begs leave to report the same back to the Senate, with the recommendation that further consideration of said bill be indefinitely postponed.

L. P. NEWBY, *Chairman.*
WATSON,
HOUGHTON,
LA FOLLETTE,
SHIVELEY,
WOOD, and
DRUMMOND.

Mr. President, a minority of your committee on judiciary, to whom was referred Senate bill No. 440, introduced by Senator Hubbell, has had the same under con-

sideration and beg leave to report the same back to the Senate with the recommendation that said bill do pass.

ELLISON.
HUBBELL.
EARLY."

The question being, Shall the minority report be substituted for the majority report?

The minority report was not substituted for the majority report.

The majority report was concurred in.

I hereby certify that the foregoing is a true, full, and complete copy of that part of the Senate Journal of the 1897 Session of the Indiana General Assembly relating to Senate bill No. 440, a bill for an act to disannex certain land and territory from the city of Hammond and declaring an emergency; a true copy of which bill is hereunto annexed and marked Exhibit "B."

Witness my hand, at Indianapolis, Indiana, this 9th day of March, 1897.

JAMES W. EGNEW,
Assistant Secretary of Senate.

EXHIBIT "B."

Senate Bill No. 440.

A bill for an act to disannex certain lands and territory from the city of Hammond, and declaring an emergency.

Whereas, the City of Hammond filed and presented its petition to the board of commissioners of Lake county at the June session thereof, for the year 1893, for the annexation of certain lands and territory described as follows, to wit: "Beginning at a point on the Indiana and Illinois

State line, which point is in the southwest corner of section number thirteen (13) in township thirty-seven (37) north, range ten (10) west of the second (2d) principal meridian; thence running easterly along the south line of said section thirteen (13) then along the south line of section eighteen (18) in township thirty-seven (37) north, range nine (9) west of the second (2d) principal meridian, to the southeast corner of said section eighteen (18); thence running northerly along the east line of said section eighteen (18) and along the east line of section seven (7) in same township and range, to the northeast corner of the southeast quarter of said section seven (7); thence running westerly along the north line of the southeast quarter of said section seven (7) to the northwest corner of said southeast quarter of said section seven (7); thence running northerly along the east line of the northwest quarter of said section seven (7) and along the east line of the west half of section six (6) in township thirty-seven (37) north, range nine (9) west of the second (2d) principal meridian to the intersection of said line with the meander line of the south shore of Lake Michigan; thence running northwesterly along the meanderings of the south shore of said lake to the intersection of said meander line with the Indiana and Illinois State line; thence running southerly along said State line to the place of beginning." And said board of commissioners decided against said petition and said city appealed from said decision and eventually procured such proceeding to be transferred to the Porter circuit court, where the December term of said court for the year 1893 there was a trial of the same, resulting in a decree of said court, that said lands and territory be annexed to the said city of Hammond, and whereas such annexation of said lands to said city was wholly unnecessary for any municipal or legitimate purpose whatever, and imposed heavy and unreasonable burdens upon the property-owners and tax-payers of said territory, without their consent and without the possibility of their being remunerated for the

same or benefited in any manner whatever; and whereas, such annexation was made without the consent of said board of commissioners, but against their consent and judgment; and whereas the said city of Hammond had under its jurisdiction, before said annexation, territory to the extent of about eight (8) square miles; and whereas the territory so annexed consisted of about five (5) additional square miles, no part of which was in contiguity with any inhabited part of said city, but was distant from the same at least one mile; and whereas, the inhabitants of said annexed territory had and have no need whatever of municipal government, said territory being used almost exclusively for grazing and agricultural purposes, and being very thinly and sparsely settled, and no part of it having been laid out into lots with reference to the city of Hammond; now, therefore,

SECTION 1. *Be it enacted by the General Assembly of the State of Indiana,* That such lands and territory be and the same are hereby disannexed from the said city and declared to be wholly exempt and free from jurisdiction of said city, in all respects, the same as if said annexation had not been made.

SECTION 2. It is further declared that an emergency exists for the immediate taking effect of this act; and the same, therefore, shall take effect and be in force from and after its passage.

[Endorsed:] Case No. 16,394. Supreme Court U. S., October term, 1896. Term No., 615. Caroline M. Forsyth, app't, *vs.* The City of Hammond *et al.* Suggestion as to Indiana legislative record since argument of case. Filed Mar. 15, 1897.

IN THE SUPREME COURT, OCTOBER TERM, 1896.

CAROLINE FORSYTH
vs.
CITY OF HAMMOND *et al.* } Notice.

To W. H. H. Miller and Thomas J. Merrifield, Solicitors for Caroline M. Forsyth:

You and each of you are hereby notified that on Monday, the 15th day of March, A. D. 1897, we shall present to the Supreme Court of the United States and ask its consideration of the "Suggestion as to Indiana legislative record since argument of case," a copy of which is handed you herewith. The record referred to therein is a certified copy of the proceedings of the Sixtieth General Assembly of the State of Indiana upon and with reference to House bill number 475, together with a copy of said bill, all certified to and under the seal of the secretary of state for the State of Indiana. In the event that the Court requires that this record be printed, this motion will be presented on Monday, the 22d day of March, A. D. 1897.

CHARLES H. ALDRICH,
FRANK F. REED,
E. W. CRUMPACKER,
Solicitors for City of Hammond et al.

Received copy of "Suggestion as to Indiana legislative record since argument of case," above referred to.

JOHN J. FORSYTH.

IN THE SUPREME COURT, OCTOBER TERM, 1896.

CAROLINE FORSYTH *et al.*
vs.
CITY OF HAMMOND *et al.*

Suggestion as to Indiana Legislative Record Since Argument of Case.

Since the argument of the above-entitled cause the landowners who had litigated the validity of the annexation proceedings and all questions relating thereto arising under the statutes and constitution of the State of Indiana and had been defeated by the decision of the supreme court of that State have sought relief at the hands of the legislature of the State of Indiana.

As shown by the accompanying record, the legislature, which has now adjourned, refused to enact a bill designed to *disannex* the lands in controversy, thus in effect confirming the action of the executive and judicial departments of the State government.

It has seemed just to our client that this fact should be brought to the attention of the Court without comment. We therefore submit a certified copy of the proceedings upon this bill under the seal of the secretary of the State of Indiana.

——— ———,
——— ———,
——— ———,
Solicitors for the City of Hammond.

IN THE SUPREME COURT, OCTOBER TERM, 1896.

CAROLINE FORSYTH
vs.
CITY OF HAMMOND *et al.*

Oliver L. Spaulding, Jr., being duly sworn, says that on the 11th day of March, A. D. 1897, he served copies of the within notice upon Thomas J. Merrifield by leaving a copy thereof at his office, No. 800 Old Colony building, Chicago, with John J. Forsyth, and upon W. H. H. Miller by mailing a copy to him at Indianapolis, Indiana.

OLIVER L. SPAULDING, JR.

Subscribed and sworn to before me this 11th day of March, A. D. 1897.

[SEAL.] WARREN A. DRAKE,
Notary Public.

[Endorsed:] Case No. 16,394. Supreme Court U. S., October term, 1896. Term No., 615. Caroline M. Forsyth, app't, *vs.* The City of Hammond *et al.* Proof of notice of suggestion as to Indiana legislative record since argument of case. Filed Mar. 15, 1897.